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No.

IN THE

Supreme Court of the United States

October Term, 1990

PHILLIP SEELIG, as President of the Correction Officers' Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

against

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE CORRECTION DEPARTMENT OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the New York Court of Appeals

IRVING ANOLIK
Counsel to TELLERMAN, PATICOFF
& GREENBERG
Attorneys for Petitioners
195 Broadway, 23rd Floor
New York, NY 10007
(212) 227-8140

THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1990
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
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Questions Presented

1. Whether, since this Court has held that urinalysis for drug screening is a search within the purview of the Fourth Amendment of the United States Constitution, the State of New York can ignore the strictures of that amendment by authorizing the suspicionless, ubiquitous, random urinalysis drug screening of the entire force numbering over ten thousand uniformed employees of the New York City Department of Correction solely because the Commissioner of Correction determined that it was appropriate to do so?

2. Since this tribunal has never approved the suspicionless, ubiquitous, random urinalysis drug-testing of an entire force, can the State of New York traduce the civil rights of correction officers by ordering such drug-testing in manifest violation of the Fourth and Fourteenth Amendments of the United States Constitution?

3. Whether the interpretation by the State of New York of such cases as *National Treasury Employees Union v. Von Raab* (489 U.S. ____, 109 S.Ct. 1384) and *Skinner v. Ry. Labor Executives Assn.* (489 U.S. ____, 109 S.Ct. 1402) as authorizing the action of the Commissioner of Correction of the City of New York, is correct and consistent with the views of this Court in those cases?

4. Whether the minority opinions by three judges of the Court of Appeals, two judges of the Appellate Division and one justice of the Supreme Court of the State of New York that the *Skinner* and *Von Raab* cases do not justify or approve what the Commissioner of Correction of the City of New York has done and therefore whether this Court should grant Certiorari to clarify the Law in this field?

5. Whether the implementation of the ubiquitous, suspicionless, random urinalysis drug-testing by the Commissioner of Correction of the City of New York is so repugnant to the guarantees of the Bill of Rights, especially the Fourth Amendment of the United States Constitution, as implemented by the Fourteenth Amendment, that this Court should hold once and for all that this type of massive suspicionless and random drug-testing cannot be condoned under the Fourth Amendment of the United States Constitution?

6. Since correction officers on duty never carry arms and are perhaps the most closely scrutinized uniformed employees in the City of New York, whether the Commissioner's order compelling random drug-testing for all correction officers is consistent with *Von Raab* and other decisions of this Court?

7. Since the "safety-sensitive tasks" envisioned by *Skinner* and *Von Raab* are not implicated in the duties ordinarily performed by correction officers, and any conceivable threat to the public is only "through a chain of ensuing circumstances" or an "indirect risk", whether the Random Drug-Testing Program is therefore unconstitutional and inconsistent with the decisions of this Court? *Skinner; Von Raab; Harmon v. Thornburgh*, 878 F.2d 484, 491 D.C. Cir. 1989, Cert. Denied, Sub Nom., *Bell v. Thornburgh*, 107 L.Ed.2d 949 (1990)?

8. Since "individualized suspicion" is the minimum standard "usually" applied by this Court when special governmental needs are absent, whether suspicionless random drug-testing of an entire force is consistent with the United States Constitution? *Skinner; Von Raab; New Jersey v. T.L.O.*, 469 U.S. 325, 342 n. 8 (1985); and *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 203-04 (2d Cir. 1984).

9. Whether there are *due process* violations under both Federal and State Law committed by the respondents against the petitioners, impacting upon petitioner's interests in "life, liberty, and/or property." *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

10. Whether the indiscriminate, all-inclusive order by the respondents for random drug-testing portends the destruction of the narrow exceptions to the Fourth Amendment incursions, converting it into a "general warrant" permitting government to intrude in the most offensive manner on the privacy of a large segment of our community, namely virtually anyone affiliated with the Criminal Justice System?

The Parties

The parties in the Court below were Phillip Seelig, President of the Correction Officers' Benevolent Association of the City of New York, Inc., and the Correction Officers' Benevolent Association of the City of New York, Inc., as petitioners. The respondents in the Court below were Richard J. Koehler, Correction Commissioner of the City of New York, the Correction Department of the City of New York, and the City of New York itself.

The same parties are involved in this petition for a Writ of Certiorari.

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Respondents.

Petition for a Writ of Certiorari to the New York State Court of Appeals

Opinions Below

The opinions of the New York Court of Appeals, the Appellate Division of the State of New York, First Judicial Department, and that of Honorable Karla Mo-

skowitz, acting justice of the Supreme Court, New York County are included in the appendix to this petition.

Jurisdiction

A—The order and opinion of the New York State Court of Appeals, made the 8th day of May 1990, three judges including the chief judge, dissenting, affirmed the order of the Supreme Court of the State of New York, Appellate Division, First Department, two justices dissenting, which order had reversed the order and judgment of Honorable Karla Moskowitz of the Supreme Court, New York County, who had enjoined the respondents from implementing the proposed Random Drug-Testing Program as per its directive dated November 17, 1987.

The Commissioner of Correction of the City of New York, arbitrarily determined that he wished to promulgate and implement suspicionless, ubiquitous, random drug-testing for the entire uniformed personnel employed by the Department of Correction of the City of New York. Upon issuing a directive to implement his decision, the petitioners brought a proceeding under Article 78 of the New York Civil Practice Law and Rules to enjoin the enforcement of that directive. A justice of the Supreme Court of New York County, Honorable Karla Moskowitz, granted the injunction. An appeal was taken by the respondents to the New York Supreme Court, Appellate Division, First Department which by a single vote, 3 to 2, overturned the order and judgment of Justice Moskowitz.

An appeal as of right was taken to the New York Court of Appeals by the petitioners and after argument, that Court, also by a single vote, 4 to 3, upheld the Appellate Division.

B—The petitioners applied for a stay of the directive compelling suspicionless random drug-testing which the New York Court of Appeals denied. An application to this Court for a stay of the enforcement of that directive was made but was denied without comment.

C—The jurisdiction to review the judgment and the orders in question by Certiorari is conferred under 28 U.S.C. §§ 1254 and 1257.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth and Fourteenth Amendments of the United States Constitution are involved herein, as is Article I Sections 6 and 12 of the New York State Constitution. Article I Section 12 and the Fourth Amendment of the United States Constitution both prohibit unreasonable searches and seizures. The Fourteenth Amendment and the Fifth Amendment of the United States Constitution as well as Article I Section 6 of the New York State Constitution guarantee due process of law to citizens of the United States and citizens of the State of New York.

In addition Article 78 of the Civil Practice Law and Rules of the State of New York is involved which provides for injunction of certain actions by public officials or others which in this case involves an injunction of the enforcement of a directive by the Commissioner of Correction of the City of New York.

The directive issued by the respondents, dated November 17, 1987, compels "all members of the uniformed force . . . including the Chief of Operations and the Commissioner" to submit to suspicionless random drug-testing.

Statement of the Case

The petitioners herein are employees of the Department of Correction of the City of New York and members of the Correction Officers' Benevolent Association of the City of New York, Inc., as well as its President, Phillip Seelig. There is no serious dispute as to what is being challenged herein. The Commissioner of Correction of the City of New York, respondent, on November 17, 1987, issued a directive which is the subject of the challenge herein, which covered "all members of the uniformed force . . . including the Chief of Operations and the Commissioner".

The directive compels all of the uniform members to submit to suspicionless random urinalysis drug-testing at the pleasure of the commissioner.

It is alleged by the respondents that they have documented a serious drug abuse problem among a significant number of members of the petitioners. In order to assure neutrality of the selection process for random, suspicionless drug-testing, the directive provides for a computer generated list of social security numbers which were programmed to select at random fifty members every two weeks. There are presently, we understand, about ten thousand or more members of the Department of Correction and about thirteen hundred members will be tested every year. Some members may never be tested and other may be tested more then once. The thrust of this directive is aimed at tenured members of the Department of Correction.

Following such selection, the employees will be notified to report for testing at the Health Management Division at a specific date and time. Failure to report or refusal to

be tested or to cooperate with the testing procedures is cause for unpaid suspension. Any probationary employee will be automatically terminated. Tenured employees will face a discharge following a hearing.

The directive also enumerates a series of steps designed both to protect personal privacy and assure testing integrity. Each test will be over-seen by a uniformed supervisor or a Health Management Division staff member of the same gender as the employee being tested, who also may have a union representative or a lawyer present.

The employee will be asked to furnish a listing of any medication, alcohol or food that has been ingested within the preceding 24 to 72 hour period.

Specimens of urine are to be furnished, without observation, in a private closed stall. A supervisory staff member of the same gender will be present, however outside of the stall to receive the specimen which shall be inspected for signs of irregularity or contamination. In addition the toilet water in the stall shall be tinted blue to deter dilution of the specimen.

These specimens are sent to a laboratory.

If adulteration is found to exist that will provide a basis for disciplinary charges and the retesting under direct observation.

Specimens are to be tested for marijuana, cocaine, opiates, amphetamines, phencyclidine and barbiturates at an accredited laboratory.

Any positive finding must be confirmed by a different technique, a gas chromatography/mass spectrometry,

which apparently is virtually infallible according to the respondents.

The petitioners maintain that drug-testing is not based upon individualized suspicion of drug use, which constitutes an unconstitutional search and seizure, and violates not only the New York Constitution but the Constitution of the United States as well.

Substantial evidence was introduced on both sides which tended to show either the reliability of the testing program or that mistakes are frequently made in testing.

The Appellate Courts below, by sharply divided opinions, held, *inter alia*, that the department's compelling interest in deterring and detecting drug use among correction officers, where diminished privacy expectations are outweighed by that interest, is not constitutionally infirm.

The petitioners maintain that the thrust of the Commissioner's order compelling suspicionless random drug-testing is that his solution to pervasive drug abuse is to dilute civil liberties. The petitioners further maintain that contrary to the Commissioner's assumptions, correction officers, while certainly members of a paramilitary force, are much less exposed to illegal substances than are ordinary police officers since the former operate in closed, supposedly drug-free environment, and they are not involved in interdicting drug trafficking.

Petitioners further maintain that where drug testing of the sort herein is permitted, it involves members of uniformed groups or others who are in almost constant contact with those who deal in and abuse drugs, and as well as with large quantities of the illegal substances themselves. Thus in the case of *Matter of Caruso v. Ward*, 72

N.Y.2d 432, where random drug-testing was upheld, it was noted that members of this elite group of officers (OCCB) are in constant contact with those who deal in and abuse drugs, as well as large quantities of the illegal substances themselves. It is therefore precisely because OCCB are so constantly exposed to drugs and those who traffic in drugs that members of this elite group are distinguishable from other police officers, who may not be randomly tested in the absence of reasonable suspicion.

Furthermore it should be noted that the respondents herein do not allege that the city jails are permeated with drug dealing and the use of illegal substances.

While it is true that a large number of inmates may have a history of substance abuse, the jails themselves are insulated from drugs, a fact which even the respondents do not challenge.

The respondents however claimed that there is evidence that 1.2 percent of all tenured correction officers and 2.9 percent of probationary officers are drug users.

In view of the close and continuous supervision under which correction officers work, observation which is much more intense than that placed upon police officers, both those in special units and otherwise, it can be scarcely be found that respondents have demonstrated an interest sufficient to justify the random suspicionless drug-testing of *all* correction officers.

Furthermore the respondents overlooked the fact that correction officers are not exposed to the constant temptation encountered by police officers, especially members of such elite corps as OCCB, who are daily presented with drug confrontations, but virtually all of petitioners' ac-

tions are scrupulously monitored by correction officers' superiors.

Moreover the rules and regulations of the New York City Department of Correction permit searches of officers's lockers, cars, personal property and even their persons while actually on duty.

Thus it is exceedingly difficult for correction officers to transport illegal substances into or out of the facility or to possess drugs while on a job.

Yet respondents proposed that all members of the uniformed force of the Correction Department, both those who are in the ranks and those who are in supervisory positions, should be compelled to undergo random urinalysis without the existence of any reasonable individualized suspicion.

Thus the respondents would impose the drastic intrusion into an individual's privacy rights entailed by random drug-testing in an effort to eliminate a problem which, without minimizing its severity, is posed by a minute proportion of its uniformed staff.

The arguments of the respondents ignores the fact that the environment in which correction officers labor greatly diminishes the need for testing.

POINT I

The Petition for Certiorari should be granted since the New York Court of Appeals majority opinion invades the privacy rights of correction officers without reasonable suspicion by subjecting them to random drug-testing in clear violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

We submit that as set forth in our statement of the case, there is less reason to subject correction officers to random drug-testing than many other paramilitary forces. Correction officers are not assigned to interdiction of drugs. They are an extremely closely supervised group of officers and in no way are they similar to members of the OCCB which is mentioned in the New York Court of Appeals decision and opinion of *Matter of Caruso v. Ward,* 72 N.Y.2d 432. The correction officers involved are basically not an elite force which is in constant contact with the interdiction of drugs and those who deal in them and abuse them. The OCCB is also constantly exposed to drugs and those who traffic in drugs so that they are clearly distinguishable from other police officers who may not be randomly tested in the absence of reasonable suspicion.

The majority of the New York Court of Appeals which now permits random urine testing of an entire uniformed force, namely the New York City Department of Correction, represents an unwarranted extension of the narrow exception permitting searches only under the most extraordinary of circumstances.

The narrow exception upon which the majority relies in the Court of Appeals is the case of *Matter of Caruso v. Ward,* 72 N.Y.2d 432 at 433 which involved "an elite *vol-*

untary corps within the New York City Police Department" which constituted "its main line of offense and defense in the war against drug trafficking".

In the case of *Caruso v. Ward,* the Court of Appeals recognized the "daily exposure to drug users and traffickers [and] staggering sums of money" which set this small, elite voluntary group of police officers apart from all others.

It is significant that the Court of Appeals theretofore had never held that police officers generally, who might occasionally be subject to the same temptation, could also be subjected to random urine drug-testing without suspicion. As a matter of fact the Court of Appeals had held in *Caruso v. Ward, supra,* that they could not be so tested (72 N.Y.2d at 439).

In fact in *Caruso v. Ward, supra,* the Court of Appeals of New York emphasized that it was recognizing only a "narrow exception" on "unique facts" involving "these particular officers" who were members of an "elite corps" who "specialized" in "hazardous drug-related investigation" and who volunteered for this special duty knowing well in advance "that they will be held to the strictest standards of probity and purity, over and above those already imposed on the police force at large" and thus "will have to operate in fish-bowl like circumstances undreamed of by Calpurnia herself" (*Matter of Caruso v. Ward, supra,* 72 N.Y.2d at 435, 439, 440, 441). Such is not so with petitioners.

The majority of the New York Court of Appeals therefore has endorsed suspicionless periodic and random urine testing of every uniformed member of the Department of Correction in the City of New York and therefore

abandons many of the unique, limiting factors present in *Caruso* and adopting instead a "fact-specific" analysis which apparently will vary from case to case without fixed or discernable limits.

We submit, as the Chief Judge of the New York Court of Appeals opined that:

> (Dissent below at Page 33):
>
> "Following this precedent it would be difficult to imagine how any officers, or anyone employed in the world of law enforcement or even anyone associated with the Criminal Justice System would be free of the requirement of random suspicionless urine drug-testing once someone in authority found it desirable. This turns the narrow exception into a general warrant permitting the Government to intrude in the most offensive manner on the privacy and dignity of a large segment of our community."

There is no dispute by either side herein that the urine drug-testing ordered by the Department of Correction to detect drug abuse constitutes a search within the purview of both the State and Federal Constitutions (Matter of *Patchogue-Medford Congress of Teachers v. Educ.*, 70 N.Y.2d 57; Matter of *Caruso v. Ward, supra.; National Treasury Employees Union v. Von Raab*, - U.S. - 109 S.Ct. 1384; and *Skinner v. Ry. Labor Executor's Assn.*, -U.S.- 109 S.Ct. 1402).

While we recognize that occasionally exceptions are made to these constitutional protections, generally indispensable to any search, this is not an ordinary exception, but actually a double exception to what the constitution in

general requires: namely, a warrant *and* probable cause or reasonable suspicion.

From reading the decisions and opinions of the Supreme Court of the United States and up to the present case in New York, it has been clear that these extraordinary exceptions are only available in the narrowest of circumstances.

In *Caruso v. Ward, supra,* (372 N.Y.2d 439) the Court of Appeals found that the officers there were not ordinary police officers but a special voluntary group of police who had volunteered in the ranks to participate as select members of an "elite group" with special job benefits and career opportunities, which specialized in investing highly sensitive drug transactions, and which by definition and common understanding called for performance and integrity and thus public accountability, well beyond what was expected of police officers in general.

We submit that this Court has *never* sanctioned the type of ubiquitous, suspicionless random urinalysis drug-testing as has been approved by the New York Court of Appeals.

No one endorses the use of drugs and both the respondents and the petitioners are solidly against drug abuse. They differ however with respect to the means which the Commissioner has now adopted to fight this problem and we submit that the dilutions and destruction of essential rights is not the way to cope with this problem.

The respondents argue that random urine testing is the only effective means for detecting drug abuse. In the *Caruso* case, the necessity for such testing was urged because OCCB officers operated in the field independently not subject to any observation of their superiors. In direct

contrast, it is now argued that correction officers must be so tested precisely because of their confinement in close quarters, where obviously they are subject to the ready observation of their superiors.

It is easy to make arguments that all public servants should always be above suspicion of drug use and therefore subject to random urine testing.

While the eradication of illegal drug use is a desirable goal, it is equally difficult to reconcile with the Constitution of the United States and of the State of New York when the result is a progressive erosion of prior restrictions and a continuous expansion of the Government's power to search large segments of our community without a warrant, without probable cause, without reasonable suspicion and without any basis to suspect the individual being testing of illegal acts.

Searching thousands of innocent people, under these circumstances, to discover a few offenders has long been considered the hallmark of unreasonableness. This basic constitutional principle, as the Court of Appeals dissent noted, was not meant to protect only criminals, or those suspected of crimes; it was designed to protect us all, including those who serve in the law enforcement community.

> *"It is neither reasonable nor just to expect those who routinely enforce the law to submit to indignities which those who violate the law can constitutionally escape"* (dissent of Chief Judge Wachtler in the Court below, p.37). (Emphasis ours.)

The petitioners herein maintain that there is no serious drug abuse problem among the vast majority of employees of the Department of Correction.

In the Courts below they submitted, and repeat here, that detection and deterrence of alleged illegal drug use by correction officers can readily be accomplished by a more aggressive program of educating superior officers in discerning the currently acceptable standards of urinalysis, *i.e.*, reasonable suspicion of illegal drug use.

On the other hand the respondents have maintained and still maintain that since about one percent of the correction officers since January 1985, have tested positive in drug tests conducted by the Department's Health Management Division, and that Doctor Robert F. Dupont, a former director of the National Institute of Drug Abuse, opines that observation alone is ineffective, that therefore the suspicionless random drug-testing should be permitted.

Petitioners of course maintain that the random drug-testing program, without reasonable suspicion or probable cause is clearly unconstitutional.

Respondents have succeeded in convincing the Court of Appeals to abandon the "reasonable suspicion" standard and have therefore promulgated a "random" suspicionless drug-testing program by urinalysis.

There can be no doubt that the Fourth Amendment protects against unreasonable searches and seizures undertaken by either the Federal or State Governments. The Supreme Court held it applicable to the actions of State Governments through the due process clause of the Fourteenth Amendment. *(Mapp v. Ohio*, 367 U.S. 643 [1961]); *Wolf v. Colorado*, 338 U.S. 25 (1949). No one in this action disputes the fact that urinalysis testing constitutes a search within the meaning of the Fourth Amendment of the United States Constitution.

When infringement on Fourth Amendment Rights "serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectation against the government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context" (*Von Raab,* 109 S.Ct. at 1390; *Skinner v. Ry. Labor Executor's Assn.*, ___ U.S. ___, 109 S.Ct. 1402, 1413).

On the basis of this balancing test, this Court must determine whether the random suspicionless testing of all correction officers constitutes an unreasonable search.

It must be kept borne in mind that the correction officers involved do not require "top secret" clearance *(Johnson v. City of Plainfield*, 731 F.Supp. 689 [1990—U.S.D.C.—N.J.]).

The safety interests at stake herein are not the same magnitude as the so-called safety interest for which this Court has sustained drug-testing programs (See *Skinner, supra*, 109 S.Ct. 1402 (Train Wrecks) ; *Von Raab*, 109 S.Ct. 1384, and *National Federation of Federal Employees v. Cheney,* 884 F.2d 603 (D.C. Cir. 1989) [Employees carrying fire arms]; and *Jones v. Jenkins*, 878 F.2d 1476 (D.C. Cir. 1989) [Bus load of handicapped children]).

In *Harmon v. Thornburgh*, 878 F.2d 484, the Court of Appeals for the District of Columbia, interpreting *Von Raab* and *Skinner,* 878 F.2d 484 [1989] emphasized the *immediacy of the threat* (*Cert. denied sub nom. Bell v. Thornburgh*, 107 L.Ed.2d 949 [1990]).

It is this aspect of *Harmon* that compelled the District Court in *AFGE v. Cavazos,* 721 F.Supp. 1361 (D.D.C.,

1989) to uphold the random testing of motor vehicles operators (721 F.Supp. at 1373).

In the case at bar, the petitioners are custodians who do not carry weapons on the job and who are not charged primarily with the interdiction of drugs.

In *N.F.F.E. v. Cheney,* 884 F.2d 603 (D.C. Cir. 1989) the Court of Appeals remanded the case to the District Court in order to develop a more complete factual record to determine who the many employees in "chemical and nuclear surety positions" actually were "responsible for the custody, transportation, storage, maintenance, demilitarize, and security of the surety material." (id. at 611)

In both *Skinner* and *Von Raab,* this Court engaged in a careful evaluation of the Government's compelling interests, in the avoidance of disastrous accidents in the former case, and in insuring that customs agents did not place themselves at risk of bribery or injure others with the weapons they carried in the latter case. It weighed these interests against the privacy expectations of the employees. In both cases the Supreme Court found the interest of the employees to be diminished due to the nature of the employment. In *Von Raab,* this Court made it clear that the privacy expectations of employees in certain types of public service may be diminished due to the type of employment, but that these situations were unique and "unlike most private citizens or government employees in general." (*Von Raab,* 109 S.Ct. at 1394).

Moreover in addressing the question of off-duty drug use of certain custom agents, the Supreme Court was careful to emphasize that the unique mission of the U.S. Custom Service "creates a compelling interest in insurance that many of these [agents] do not use drugs even off duty, for such use creates risks of bribery and blackmail

against which the Government is entitled to guard." (*Von Raab,* 109 S.Ct. at 1395).

In *Johnson v. City of Plainfield, supra,* the Court noted that five categories could be considered where *reasonable suspicion testing* of all employees would be justified:

> "(1) Observable phenomena, such as direct observation of drug use or possession and/or physical symptoms of being under the influence of a drug; (2) A pattern of abnormal conduct or erratic behavior; (3) Arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking; (4) Information provided either by reliable and credible sources or independently corroborated; or (5) Newly discovered evidence that the employee has tampered with a previous drug test.

We submit that the foregoing criteria are certainly well worth considering in determining whether random drug tests are to be authorized for anyone. Indiscriminate suspicionless random drug-testing, we submit, is a patent violation of the Fourth and Fourteenth Amendment, and palpably of the Fifth Amendment.

Furthermore the respondents have not shown that they have tried alternative, less intrusive methods of detecting and deterring drug use before resorting to urinalysis testing without reasonable suspicion.

They have not shown that they have any meaningful education program regarding drug abuse for both correction officers and supervisors. They apparently are using

random drug-testing as a substitute for employee supervision.

Respondents also have claimed that correction officers might smuggle and sell drugs to inmates inside the facility. The respondents however do not demonstrate how random drug-testing will solve this problem. One does not have to be a drug user to be a drug smuggler or seller.

In *McDonell v. Hunter,* 809 F.2d 1032 (8th Cir. 1987) the Court cogently explained:

> "There is no doubt about it—searches and seizures can yield a weaith of information useful to the searcher . . . 'That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.' 612 F.Supp. at 1131. The drug problem in this country is real and dangerous. But the methods used to eradicate it must be implemented within constitutional limits, not only because the employees to be tested for drugs have an expectation of privacy, but also because the creation of unfortunate precedent in this area, especially in light of the technological advances of recent years, could and would have a far-reaching impact upon the rights of all citizens in areas outside of the drug context."

Accordingly we maintain that suspicionless random drug-testing is inconsistent with the prior opinions of this Court and is violative of the Constitutional Rights of the employees being subjected to this suspicionless drug-testing since they are not the type of employees contemplated to be tested randomly and without suspicion by the prior holding of this Court.

POINT II

Since the decision of the Court of Appeals of the State of New York falls below the Plimsoll Line promulgated by this Court with respect to the Fourth Amendment of the United States Constitution, this Tribunal should grant Certiorari so as to define the limits that states may go in broadening the warrant and probable cause exceptions to the Fourth Amendment. Moreover, this Court cannot tolerate an "Imperio in Imperium" which the New York Court of Appeals has erected by its decision.

It is of course elementary that the Constitution and the Laws of the United States made in pursuance thereof is the "supreme law of the land" (US. Const. art. VI, cl. 2.)

Even where congress has not completely displaced state regulations in a specific area, State Law is nullified to the extent it actually conflicts with Federal Law. (*Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 [1985]; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [1947]).

The Supreme Court has held that such a conflict exists either when "compliance with both Federal and State Regulations is a physical impossibility . . .", *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963), or when the State Law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress". *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

In *Jones v. Roth Packing, Co.*, 430 U.S. 519, 526, the Supreme Court ruled that:

> "This inquiry requires us to consider the relationship between State and Federal Laws as they are interpreted and applied, not merely as they are written."

It has also been held that even federal regulations may preempt States Laws, as may Federal Statutes. (*Fidelity Fed. Saving & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Hillsborough*, 471 U.S. at 713; and *Yellow Freight System, Inc. v. Jeffery L. Amestoy* (U.S.D.C.--Vermont—dec'd 4/25/90).

POINT III

In addition to the Fourth Amendment violations, we submit that the respondents' order compelling suspicionless random drug-testing of all uniformed employees traduces the rights of the petitioners with respect *to due process* of law under both the Federal and State Constitution because the order impacts upon petitioners' interests in "Life, Liberty and/or Property" (Fifth Amendment).

While we have been discussing the Fourth Amendment and the Fourteenth Amendment of the United States Constitution as well as Article I Section 12 of the New York State Constitution with respect to unlawful searches and seizures, we wish this Court to recognize that the order in question which mandates suspicionless random drug-testing for all employees of the Department of Correction also adversely impacts upon the *due process* rights of the petitioners. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

This Court has said and it is not disputed herein, that random drug-testing constitutes a "search" within the purview of the Fourth Amendment of the United States

Constitution. The New York Court of Appeals has likewise held that the random urinalysis drug-testing herein is indeed a search within the purview of Article I Section 12 of the New York State Constitution. New York State of course must also adhere to the mandates of the Federal Constitution. Since not only does this intrusion into the privacy of the tenured employees impact upon their right to "liberty" but implicates their "property" interest as well because refusal to take the tests or failing the tests would result in the deprivation of a livelihood because they would lose their jobs.

In *Mathews v. Eldridge*, 424 U.S. 319 (1975) this Court made it quite clear that "procedural due process imposes constraints on Governmental decisions which deprives individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clauses of the Fifth or Fourteenth Amendment" (*id.* at 332).

Under the order as we understand it, the individual employees of the Department of Correction are not entitled to any hearing or any other determination that probable cause exists before they are compelled to take the urinalysis tests, but on the contrary are mandated to do so without any right to a hearing at all.

We believe that this is contrary to the holding in *Mathews v. Eldridge, supra*, where this Court explains (*id.* at 333):

> "This Court consistently had held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolf v. McDonnell*, 418 U.S. 539, 557, 558 (1974). See *e.g.*, *Phillips v. Commissioner*, 283 U.S. 589, 596, 597 (1931). See also *Dent v. West Virginia*, 129

> U.S. 114, 124, 124 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1941)."

In *Mathews v. Eldridge, supra*, this Court made it abundantly clear that indiscriminate deprivation of a liberty and/or property interest is a violation of due process of law and therefore sets forth certain requirements that are consistent with due process which the government and the states must obey. This Court therefore held (*id.* at 424 U.S. 334, 335):

> "These decisions underscore the truism that '[d]ue process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue Process is flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interest that are affected. *Arnett v. Kennedy, supra*, at 167-168 (Powell J., concurring in part); *Goldberg v. Kelly, supra*, at 263-266; *Cafeteria Workers v. McElroy,*

> *supra*, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g. Goldberg v. Kelly*, *supra*, at 263-271."

We must recognize that the specious argument of the respondents that the petitioners are public employees has been rejected by this Court as a reason to treat them any differently than other employees. In *Board of Regents v. Roth, supra*, 408 U.S. at 571, this Court recognized that the "wooden distinction between 'right' and 'privilege' that once seemed to govern the applicability of the procedural rights has now been rejected". In footnote 9 on that same page, this court noted that public employment was not a "privilege" but was to be treated as a "right", and that "procedural" due process grantees therefore are fully applicable.

In *Graham v. Richardson*, 403 U.S. 365, 374, this tribunal recognized "this Court now has rejected the concept that constitutional rights turns upon whether a governmental benefit is characterized as a 'right' or as a 'privilege' ".

See also *Morrissey v. Brewer*, 408 U.S. 471, at 482; and a number of other cases cited in that footnote.

In *Board of Regents v. Roth, supra*, 408 U.S. at 571 this Court explained the importance of the due process clause and the concept of "liberty" and "property". Thus it ruled:

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . .[T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process". Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process it has at the same time observed certain boundaries. For the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment must be given some meaning."

It must be borne in mind that a mistaken test could have drastic effects upon the individual employee who is the victim of such test or inaccuracy. Furthermore the assault to the dignity and liberty of the individual involved cannot be over estimated.

In view of the foregoing, we maintain that the majority opinion of the Court of Appeals which observes that public employment as correction officers diminishes the expectation of privacy of the petitioners herein, is inconsistent with the due process recognition that public employment cannot be considered a "privilege" but must be treated the same as any other employment so far as due process is concerned.

We maintain, therefore, that it is wrong and unconstitutional to compel these public servants to forfeit their rights under the Fifth and Fourteenth Amendments to say nothing of the Fourth Amendment because they have become public employees. They are certainly entitled to a hearing and to procedural due process before being subjected to this sort of treatment. The order involved herein grants no such hearing or right to a hearing.

Accordingly we maintain that for due process reasons, as well, this Court should grant Certiorari.

POINT IV

Since the so-called "safety sensitive tasks" envisioned by *Skinner* and *Von Rabb* are not implicated in the duties ordinarily performed by most of the correction officers and therefore any conceivable threat to the public is only "through a chain of ensuing circumstances" or an "indirect risk" which criteria this Court has indicated does not justify random drug-testing, Petitioners therefore submit that the Courts below have confused the decisions of this Court and by so doing have violated the constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the Petitioners.

In both the *Skinner* and *Von Raab* cases, which are the most recent pronouncements of this Court in the field of

random drug-testing, it has become apparent that such testing is limited to persons involved in "safety-sensitive tasks" and under circumstances where there is a direct and imminent risk to the public at large.

In the case of the petitioners herein, however, who do not carry guns on duty, do not interdict drug trafficking as a general rule, and are primarily custodians under extremely intense supervision at all times, the concern expressed by this court in the foregoing cases is not implicated in the duties ordinarily performed by correction officers. (See also, *Harmon v. Thornburgh*, 878 F.2d 484, 491 (D.C. cir. 1989, cert. denied, sub. nom., *Bell v. Thornburgh*, 107 L.Ed.2d 949 (1990). Furthermore "individualized suspicion" which has always been held to be the minimum standard "usually" applied by this Court when special governmental needs are absent, is not a part of the executive order of the Commissioner of Correction since the thrust of that order is to compel suspicionless random drug-testing without any basis whatsoever other then the general conjecture of the Commissioner that it is in the best interest of the running of his department to do so.

This Court has never condoned such an ambiguous and indiscriminate policy which is clearly contrary to every decision of this Court that we could find. (See *Skinner; Von Raab; New Jersey v. TLO.*, 469 U.S. 325, 342 n. 8 (1985) and *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 203-204 (2d cir. 1984).

See also, (*Mathews v. Eldridge, supra*, 424 U.S. 319; and *Board of Regents v. Roth, supra*, 408 U.S. 564.)

The work performed by the vast majority of the petitioners is not safety-sensitive in the sense of any of the cases decided by this Court up to this point.

The petitioners are not in contact with those who sell or distribute drugs. They do not interdict drug trafficking as a general rule. They do not carry weapons while working. They are not out in the field as are OCCB Elite Special Officers.

Furthermore none of their tasks directly impact upon the public such as a pilot who may have been involved in an accident; custom officers carrying guns; motormen involved in an accident, and so forth.

Under the circumstances, we therefore submit that it is contrary to the rights guaranteed by the Bill of Rights of the United States Constitution to compel these tenured employees to forfeit their rights under the Fourth, Fifth and Fourteenth Amendments without rhyme or reason except that the Commissioner of Correction determines that it is expedient, in his opinion, that those rights be forfeited.

The consistent numerous decisions of this Court amply demonstrate that this tribunal is quite sensitive to the preservation of the Bill of Rights and that it would not lightly undermine the sanctity of those provisions which this country holds so dear.

CONCLUSION

This Court should grant the Writ of Certiorari and should vacate the order of the Court of Appeals of the State of New York with instructions to conform its opinion to the requirements of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and to forbid suspicionless random drug-testing of all employees as being patently unconstitutional.

Dated: June 29, 1990
New York, New York

Respectfully submitted,

IRVING ANOLIK
A Member of the Bar and Of Counsel
to TELLERMAN, PATICOFF &
GREENBERG, ESQS.
Attorneys for Petitioners
195 Broadway
New York, NY 10007

Attorney's Certification

State of New York)
) ss.:
County of New York)

Irving Anolik, a member of the Bar of this Court, certifies that a true copy of the within Petition for a Writ of Certiorari to the New York Court of Appeals was duly served by personal delivery and by first class mail upon the attorney for respondent at that attorney's designated address: Robert Abrams, Attorney General State of New York, 120 Broadway, New York, New York 10005.

Dated: June 29, 1990

IRVING ANOLIK

Order and Decision of Justice Moskowitz.

Present:

Hon. Karla Moskowitz,
Justice.

IN THE MATTER OF THE APPLICATION

OF

PHILIP SEELIG, as President of the Correction Officers' Benevolent Association, Inc., and THE CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC.,,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

Index #29321/87

Petitioners herein, having commenced a special proceeding pursuant to Article 78 of the Civil Practice Law

and Rules, seeking a judgment enjoining Respondents from implementing the proposed random drug testing program for New York City Correction Officers as set forth in their November 17, 1987 directive, and for such other and further relief, as to this Court may seem just and proper; and the proceeding having duly come to be heard before this Court on December 14, 1987;

NOW, upon reading and filing the Order to Show Cause signed by the Honorable Karla Moskowitz, J., the 24th day of November, 1987; the Petition verified by Philip Seelig on November 23, 1987, and the exhibits annexed thereto, submitted in support of the Verified Petition; the Answer on behalf of Respondents verified by Robert Daly on December 1, 1987, with one exhibit annexed thereto, the Affidavit of Thomas Murray, sworn to on December 2, 1987, the Affidavit of Robert L. DuPont, M.D., sworn to on November 3, 1987, all submitted in opposition; and the Reply Affirmation of Raymond E. Kerno, dated December 10, 1987, submitted in further support of the Verified Petition;

AND, the Petitioners having appeared by the Law Offices of Richard Hartman, Raymond E. Kerno, of Counsel, and the Respondents having appeared by the Honorable Peter L. Zimroth, Corporation Counsel of the City of New York;

AND, the application having been submitted on December 14, 1987, and after due deliberation having been held thereon and upon the Memorandum Decision of this Court, dated June 21, 1988;

NOW, based upon the foregoing, it is ordered that the Petition is granted and it is further

ORDERED AND ADJUDGED that the Respondents are enjoined from implementing the proposed random drug testing program as contained in the November 17, 1987 directive.

ORDER:

KARLA MOSKOWITZ
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK—IAS Part 25

IN THE MATTER OF THE APPLICATION
OF

PHILIP SEELIG, *et al.*,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

against

RICHARD KOEHLER, *et al.*,

Index No. 29321/87

KARLA MOSKOWITZ, J.:

Petitioners bring this Article 78 proceeding to enjoin respondents' proposed random drug testing program for New York City correction officers. The court grants the petition and enjoins respondents from implementing the program set forth in their November 17, 1987 directive.

PARTIES' CONTENTIONS

Petitioners contend there is no serious drug abuse problem among a significant number in the Department. They submit that detection and deterrence of alleged illegal drug use by correction officers can readily be accomplished by a more aggressive program of educating superior officers in discerning the currently acceptable stand-

ard for urinalysis, i.e., reasonable suspicion of illegal drug use.

Respondents maintain there is a documented problem of illegal drug use by correction officers. They claim that, since January 1985, one hundred and twenty-one tenured officers have tested positive in drug tests conducted by the Department's Health Management Division. They also claim that less comprehensive measures have not been successful in preventing an increase in the number of correction officers using illegal drugs. Dr. Robert F. DuPont, a former director of the National Institute of Drug Abuse, states that recognized medical knowledge indicates that reliance solely on observation of overt physical symptoms is ineffective in detecting illegal drug use. Respondents claim random urinalysis is the most effective means of detecting illegal drug use and also a major deterrent to such drug use.

Petitioners argue that random drug testing violates the constitutional rights of correction officers. They maintain the challenged random drug testing program is virtually identical to the one recently held unconstitutional in *Caruso v. Ward,* 133 Misc2d 544, (Sup. Ct. N.Y. Co. 1986) *aff'd,* 131 AD2d, 214, (1st Dep't 1987). Moreover, they submit that respondents' present drug testing program, based upon a "reasonable suspicion" standard, is effective in both detecting and deterring illegal drug use without infringing on correction officers' constitutional rights.

Respondents contend the challenged random drug testing program is a reasonable, constitutionally permissible search, given the critical safely functions a correction officer performs, the reasonable scope of privacy expectations members of the paramilitary correction work force have, the limited intrusion the challenged urinalysis procedure makes, and the likelihood that less comprehensive measures would not be effective in reversing the claimed problem of illegal drug use in the Department of Correction's work force.

THE DIRECTIVE

The challenged directive states that the Department of Correction needs to institute random drug testing "to detect and deter the use of illegal drugs by members of the Department" allegedly because:

> In spite, of an aggressive drug prevention educational program and testing procedures, including an aggressive reasonable suspicion testing program, the Department has documented a serious drug abuse problem among a significant number of its members.

(Directive, paragraph V).

In paragraph VI(A), the directive provides for a random selection process by computer based on an employees social security number. As a result, some employees may be selected more than once, some not at all, although each has the same chance of being selected. Each bi-weekly pay period, fifty random numbers are chosen from all members of the Department up to and including the respondent correction commissioner. These numbers are matched against the employee's social security number. A Legal Division representative then matches the list of randomly selected social security numbers with the names of the corresponding employees.

The Legal Division representative then gives the names to the Integrity Control Office or designated supervisor who in turn contacts the Health Management Division. The Integrity Control Officer or designated Supervisor personally notifies the selected member on the day of the scheduled exam to report for testing. No one may be excused or rescheduled without approval of the Legal Division Representative. Failure to report or cooperate or refusal to be tested is cause for suspension without pay. Probationary members are terminated. Tenured members

found guilty after an administrative hearing face penalties which include termination.

The testing procedures are set forth in great detail in subdivision B of paragraph VI. The Health Management Division (HMD) Staff is to verify the identification of the person. A supervisor or HMD staff member of the same gender as the employee will insure the "integrity" of the testing procedure. The member is to provide the specimen in the privacy of a stall with a door that can be closed or another partitioned area that allows for individual privacy. The staff member is to remain in the room, but outside the stall until the specimen is provided.

Other safeguards are provided to assure that the sample is not altered (*e.g.* toilet bluing agent to deter the dilution of specimens, removal of all outer garments and personal belongings before entering the stall).

If there is reasonable suspicion to believe that the member providing the specimen has attempted to alter it, the staff member is to document the facts in writing giving rise to the suspicion, and the member is to provide another specimen under direct observation of the staff member, and both specimens are to be analyzed. If there are no reasonable grounds for believing the specimen has been altered, but the lab report reflects that the specimen has been adulterated, that is to provide the basis for disciplinary charges and additional testing under direct observation of a staff member.

Immediately after collecting the specimen, the supervising staff member is to test and examine the specimen which is then tightly capped, properly sealed with evidence tape and labeled in the presence of the member tested who is to initial the label and any forms. The storage, transportation, and surrender of the specimens to the lab is to be under the strict supervision of the HMD in order to maintain an "unbroken chain of custody" throughout the procedure. The member is required to complete a form which is to include information relative

to any medication, alcohol and foods ingested within the, previous 24 to 72 hours. This form is forwarded to the Legal Division Representative. Upon request, HMD is to provide the member with copies of the forms relevant to the test (Directive, paragraph VI [B]).

The directive provides for Thin Layer Chromatography (TLC) and the Enzyme Multiplied Immunoassay Technique (EMIT) testing procedures at "recognized professional laboratories" without specifying which test. Positive result must be confirmed by Gas Chromatography/ Mass Spectrometry (GC/MS) (Directive, paragraph VI [C]). Positive specimens are to be preserved for a period of six months at the laboratory. An employee may have the specimen retested at another laboratory of his or her own choice at his or her own expense. (Directive, paragraph VI [D]).

Negative lab results are retained in a file at the Legal Division. No record is to be maintained in the employee's personnel file. If the lab results are positive, a copy of the results is retained in a file at the Legal Division. The original copy is forwarded to the Division of Employee Discipline with copies to the Operations Division and the member's facility. Within 72 hours, the member's commanding officer is to issue a memorandum of complaint against the member to the commissioner. (Directive, paragraph VI [F]. However, the Directive does not state what penalties will be imposed for failure to pass the drug test.

DISCUSSION

Respondents' present drug testing program, based upon the "reasonable suspicion" standard, was recently found not violative of Fourth Amendment rights. *King v. McMickens*, 120 AD2d 351 (1st Dep't 1986). Respondents now seek to abandon the "reasonable suspicion" standard and institute a "random" drug testing program. Respondents maintain, however, that the results of the chal-

lenged urinalysis will only be used for the administrative function of assessing suitability for employment in the Correction Department and not for purposes of criminal prosecution.

The Fourth Amendment protects against unreasonable searches and seizures undertaken by either the federal or by state governments. The Supreme Court has held it applicable to the actions of state governments through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 US 643 (1961); *Wolf v. Colorado*, 338 US 25 (1949). There is no question that urinalysis testing is a search within the meaning of the Fourth Amendment. *American Federation of Governmental Employees, AFL-CIO v. Dole*, N.O.R., Civil Action No. 84-1815 (D.D.C. 1987). The question is whether the testing respondents propose is a reasonable" search.

The United States Supreme Court has not directly addressed the drug testing issue, but the issue has been the subject of several articles and recent court decisions. Although the Supreme Court itself has not yet resolved the question of the constitutionality of drug testing:

> the overwhelming majority of courts that have addressed the issue have concluded that except in cases where testing is conducted in highly regulated industries, or during the employee's annual medical examination, or as part of a preemployment physical examination for job applicants, the administration of government employee drug testing unsupported by either probable cause or reason-

able suspicion constitutes an unreasonable search and seizure[1]

In *A Proposal for Mandatory Drug Testing, supra*, mandatory drug testing cases are discussed vis a vis various industries. *Shoemaker v. Mandell*, 619 F Supp 1089 (D.N.J. 1985), *aff'd*, 795 F2d 1136 (3d Cir.), *cert. denied*, ___ US ___, 107 Sup Ct 577 (1986) is cited as an example of a case involving random drug testing of horse racing jockeys. There, random breathalyser and urinalysis testing of horse racing jockeys was upheld because horse racing is a highly regulated industry.

In *Seelig v. McMickens*, N.O.R., NYLJ, August 7, 1986, p. 7, c. 2 (N.Y. Co. Sup. Ct.) drug testing was upheld as part of the employee's annual medical examination. There, drug testing of correction officers assigned to driving prison vans and buses was upheld as being less intrusive than urinalysis at other times "in view of the strong security and safety considerations involved" in transporting prisoners, and also because of the drivers' "reduced justifiable expectations of privacy."

The cases cited under the pre-employment physical examination category are *National Treasury Employees Union v. Von Raab*, 816 F2d 170 (5th Cir.), *emergency stay denied*, ___ US ___, 107 Sup Ct 3182 (1987) which upheld a drug testing program for applicants in certain Customs Service positions (discussed *infra*) and *McDonell v. Hunter*, 612 F Supp 1122, 1130 (S.D. Iowa 1985), *rev'd on other grounds*, 809 F2d 1302 (8th Cir. 1987) which held that the "Fourth Amendment . . . does

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[1]Failla, A Proposal for Mandatory Drug Testing for Federal Civilian Employees, 62 NYU L REV 322, 338 (1987); *See also*, Baer, *Substance Abuse*, NYLJ, June 5, 1987, p. 1, col. 1 at p. 2, col. 2; Hall, Search and Seizure, Cumulative Supplement §17:10.1 at 494 (1987); LeFave and Israels, Search and Seizure, §10.3(c) (1987); *Matter of Patchogue-Medford Congress of Teachers v. Board of Education*, 70 NY2d 57, 64.

not preclude taking a body fluid specimen as part of a pre-employment physical exam."

The cases which support the unreasonable search and seizure nature of drug testing of government employees are too numerous for discussion here (see 62 NYU L REV 339 n. 132). But the following cases deal with uniformed public employees: *American Federation of Gov't Employees v. Weinberger*, 651 F Supp 726 (SD Ga. 1986) in which random drug testing of federal civilian police officers employed at military facilities was enjoined; *Lovvorn v. City of Chattanooga*, 647 F Supp 875 (ED Tenn. 1986) in which random urinalysis testing of city firefighters was enjoined; *Capua v. City of Plainfield*, 643 F Supp 1507 (DCNJ 1986) in which random drug testing of both firefighters and police officers was enjoined; *Turner v. Fraternal Order of Police*, 500 A2d 1005 (D.C. Ct. of App. 1985) and *City of Palm Bay v. Bauman*, 475 So2d 1322 (Fla. Dist. Ct. App. 1985) which required a reasonable suspicion standard for drug testing of police officers, and *Caruso v. Ward*, 131 AD2d 214 (1st Dep't 1987) with a similar requirement for drug testing of police officers assigned to the New York City Police Department's Organized Crime Control Bureau (see also the cases cited in *Caruso v. Ward, supra*, 131 AD2d at 216).

The Supreme Court recently agreed to hear the constitutionality issue of the drug testing involved in *Von Raab, supra* (see, NYLJ March 1, 1988, p. 1, col. 1). *Von Raab* involves the Customs Service's urinalysis drug screening program for applicants for positions that either directly involve the interdiction of illicit drugs, require the carrying of a firearm, or involve access to classified information. It is interesting to note that the Customs Service, unlike the respondents here, did not attempt to justify drug screening on the ground that it "suspected a significant level of drug use among its employees" 816 F2d at 173. Rather, the court considered the "constitutionality of the

program only as it applies to current employees seeking a transfer." *Id.* This was apparently an important factor because a transfer was the "result of a process that [the employee] chose to set in motion." *Id.* at 177. The Fifth Circuit held, however, that the warrantless drug tests proposed by the Customs Service were reasonable even without a showing of reasonable suspicion. *Id.* at 180. Until the Supreme Court definitively decides the constitutionality of random drug testing in *Von Raab*, this court must rely primarily on those cases which have been decided within its jurisdiction.

The Appellate Division, First Department, in deciding *Caruso v. Ward, supra*, noted that the recent Court of Appeals case, *Matter of Patchogue-Medford Congress of Teachers v. Board of Education*, 70 NY2d 57 "requires that reasonable suspicion be established before . . . drug testing [can be implemented]." *Caruso v. Ward*, 131 AD2d at 217. There must be "a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 US 520, 539 (1979). Although courts have found that correction officers' "reasonable expectation of privacy . . . must yield to compelling government interests," *King v. McMickens, supra*, 120 AD2d at 353; *see also, Von Raab, supra*, at 816 F2d at 178; *McDonell v. Hunter, supra*, 809 F2d at 1308, New York Courts, nonetheless, still adhere to the "reasonable suspicion" standard. *King v. McMickens, supra.*

Random drug searches conducted by the State may be constitutionally permissible without reasonable suspicion "when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subject to unregulated discretion." *Patchogue-Medford*, 70 NY2d at 70. The court must balance these three factors in determining whether respondents' proposed regulation should be struck down.

Recent appellate court decisions in New York State have held that urinalysis is "intrusive and an invasion of privacy by its very nature. *Caruso, supra*, 131 AD2d at 217; *cf, Matter of Patchogue, supra*, 70 NY2d at 67-68. Thus, there is no question that the privacy rights which are implicated are not minimal. The Court of Appeals has stated:

> The act of discharging urine is a private, indeed intimate, one and the product may contain revealing information about an individual's personal life and habits for those capable of analyzing it. There is no question that requiring a person to disrobe and expose his body or body cavities, or empty the contents of his pockets, involves a sufficient intrusion on privacy to constitute a search. . . . Requiring person to urinate in the presence of a government official or agent, as is sometimes required in these cases . . . is at least as intrusive as a strip search. Even when the individual is permitted to perform the act in private, at the command and supervision of a person designated by the state, privacy interests are implicated. Ordering a person to empty his or her bladder and produce the urine in a container is no less offensive to personal dignity than requiring an individual to empty his pockets and produce a report containing the results of a urinalysis examination.

Patchoque-Medford, supra, 70 NY2d at 67-78.

This court is mindful of *McDonell v. Hunter*, 809 F2d 1032 (8th Cir. 1987), in which a limited uniform and random urinalysis of Iowa Department of Corrections employees who have regular contact with prisoners on a day-to-day basis in medium or maximum security prisons was allowed "because the institutional interest in prison secu-

rity is a central one, because urinalyses are not nearly so intrusive as body searches and because this limited intrusion into the guards expectation of privacy is . . . one which society will accept as reasonable . . ." 809 F2d at 1308. However, this case is distinguishable from *McDonell* because the Court of Appeals has found that random urinalysis testing is intrusive and therefore privacy rights are not so easily yielded.

The government's interest in regulating drug use among its correction officers is substantial. Respondents' assert that officers on drugs endanger other officers as well as the safety of inmates. Moreover, the integrity of the Department of Correction is undermined when its officers are involved with any drug use. Indeed, the courts have recognized the special role of corrections officers and privacy rights may have to give way when one assumes the responsibilities of this position:

> The correction officer occupies a sensitive position and is subject to paramilitary discipline. He cannot perform his demanding duties if impaired by drugs. His reasonable expectation of privacy must yield to compelling governmental interests when he becomes an officer.

King v. McMickens, 120 AD2d 351, 353 (1st Dep't 1986). However, in light of the Court of Appeals finding that the privacy rights implicated are great, respondents must advance a more compelling government interest to justify diminishing a correction officer's right of privacy.

Addressing the third prong of the *Patchogue-Medford* balancing test, the court finds that the proposed regulation appears to provide adequate safeguards to insure that the individual's reasonable expectation of privacy is not subject to unregulated discretion. The integrity of the testing procedure is insured, and the member is required

to fill out forms regarding certain foods or medication which might affect the test results. The problem of false positives is eliminated by the confirmatory GC/MS test which is recognized as "highly accurate." 43 THE RECORD, No. 4, pp. 454, 456 Bar Ass'n of the City of New York Committee on Labor and Employment Law, "Drug Testing in the Workplace." In addition, the member may designate a lab of his or her own choosing for an independent analysis of the original urine sample. However, no test "can determine how recently the employee was exposed to the drug, how the employee was exposed, or more significantly, whether there was any impairment at the time the sample was taken." *Id.* at 454.

While the integrity of the program is insured, the random program does not limit the number of times a person may be selected in a given time period. Once a person is randomly chosen, his or her social security number is not removed from the list and thus that person may be called again. Similarly, some people may never be selected for drug testing.

Although the safeguards appear adequate, respondents have not shown they have tried alternate less intrusive methods of detecting and deterring drug use before resorting to urinalysis testing without reasonable suspicion. For example, respondents could first implement an educational program regarding drug abuse for both correction officers and supervisors. Random drug testing should not be used as a substitute for employee supervision. Respondents could also provide for a mandatory urine test as part of the officer's annual physical. In addition, respondent may still employ drug testing upon a showing of reasonable suspicion.

The directive does not set forth the discipline to be imposed when an employee tests positive for drug use. Employees should be advised of the penalties imposed for a positive test result. The Bar Association of the City of

New York's Committee on Labor and Employment Law Report on "Drug Testing in the Workplace" recommends that employers "should prefer rehabilitation over discipline, where rehabilitation is feasible," 43 THE RECORD, No. 4, p. 475. In addition, the Committee observes that disclosure of "an accurate positive test can have unfair effects, since the damage to reputation and careers can outlast the employees rehabilitation." *Id.* at 449. Moreover, the directive does not specifically provide that test results will be kept strictly confidential.

A distinction must also be made between drug testing of current employees and applicants for employment, *see, e.g., Doziar v. New City*, 130 AD2d 128 (2d Dep't 1987). "The government has a legitimate interest in testing job applicants, because the government has had no opportunity to observe the applicant in the workplace" 62 NYU L REV *supra,* at 339 n. 131. However, "[s]ince most government employees in safety and law enforcement occupations are subject to at least day-to-day observation in the workplace, a supervisor with only minimal training could detect the predictable outward symptoms and the performance impairment associated with drug use and utilize the reasonable suspicion standard to safeguard the government's interests." *Id.* at 363 n. 297. Thus, alternative measures should be implemented before resorting to random drug testing.

Respondents claim that correction officers smuggle and sell drugs to inmates inside the facility. However, respondents do not demonstrate how random drug testing will solve this problem. One does not have to be a drug user to be a drug smuggler or seller.

The question before the court, as noted in *American Federation of Gov. Employees, supra,* "is not whether drug use, off-duty or on-duty is compatible with federal [here, state] employment. Rather, the question is by what means is it permissible to come by evidence of such drug

use." (emphasis in the original). Quoting *McDonell v. Hunter, supra,* the court continued:

> 'There is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher . . . That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.' 612 F Supp at 1131. The drug problem in this country is real and dangerous. But the methods used to eradicate it must be implemented within constitutional limits, not only because the employees to be tested for drugs have an expectation of privacy, but also because the creation of unfortunate precedent in this area, especially in light of the technological advances of recent years, could and would have a far-reaching impact upon the rights of all citizens in areas outside the drug context.

The court finds that respondents' proposed random drug testing program is a constitutionally unreasonable search and seizure. The directive's safeguards are insufficient in light of the great intrusion of correction officers' privacy. Respondents have not shown that other, less intrusive means to detect drug users among correction officers have been implemented and have failed. Absent such a showing, this court is constrained to follow the decisions in *Patchogue-Medford, supra,* and *Caruso, supra.*

Courts have consistently struck down similar directives and this court finds that respondents have failed to present a detailed procedure or compelling circumstances sufficient to justify deviating from the law of this state.

Accordingly, the petition is granted and respondents are enjoined from implementing the random drug testing

program contained in their November 17, 1987 directive.
Settle judgment on notice.

Dated: June 21, 1988

A.J.S.C.

Order of Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 12, 1989.

Present—Hon. Joseph P. Sullivan,

Justice Presiding

E. Leo Milonas
Ernst H. Rosenberger
Betty Weinberg Ellerin
Israel Rubin,

Justices.

IN THE MATTER OF THE APPLICATION

OF

PHILLIP SEELIG, as President of the Correction Officers Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

against

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE CORRECTION DEPARTMENT OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents-Appellants.

37402

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about October 20, 1988, which enjoined them from implementing a proposed random drug testing program set forth in a directive dated November 17, 1987, issued by respondents-appellants,

And said appeal having been argued by Irving Anolik, of counsel for the petitioners-respondents, by Michael S. Adler, of counsel for the respondents-appellants, and briefs having been submitted as *Amici Curiae,* by Joel C. Glanstein, of counsel for the Lieutenants Benevolent Association of the City of New York, and by Adam Ira Klein, of counsel for Correction Captains Association, Assistant Deputy Wardens Association, Sanitation Officers Association, Superior Officers Association of the New York City Housing Authority Police and Transit Police Department Sergeants Benevolent Association; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the judgment so appealed from be and the same hereby is reversed, on the law, without costs and without disbursements, and the petition dismissed. [Milonas and Ellerin, JJ. dissent in an Opinion by Milonas, J.]

ENTER:

KATHERINE O'HAGAN WOLFE
Deputy Clerk

Opinion of Appellate Division, First Department.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, JUNE 1989.

Joseph P. Sullivan, J.P.
E. Leo Milonas
Ernst H. Rosenberger
Betty Weinberg Ellerin
Israel Rubin, JJ.

IN THE MATTER OF THE APPLICATION

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PHILLIP SEELIG, as President of The Correction Officers Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

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37402

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Irving Anolik, of counsel (Barbara H. Daly with him on the brief; Tellerman, Paticoff & Greenberg, attorneys) for petitioners-respondents

Michael S. Adler, of counsel (Francis F. Caputo, him on the brief; Peter L. Zimroth, attorney) for respondents-appellants

Joel C. Glanstein, of counsel (Catherine J. Minuse with him on the brief; O'Donnell & Schwartz, attorneys) for Lieutenants Benevolent Association of the City of New York, as *Amicus Curiae*

Adam Ira Klein, of counsel (James W. Devor with him on the brief; Adam Ira Klein, P.C., attorney) for Correction Captains Association, Assistant Deputy Wardens Association, Sanitation Officers Association, Superior Officers Association of the New York City Housing Authority Police and Transit Police Department Sergeants Benevolent Association, as *Amici Curiae*

SULLIVAN, J.

Respondents, the Correction Department of the City of New York, its Commissioner and the City, appeal from a judgment invalidating, on constitutional grounds, a program for the random drug testing of all correction officers, and enjoining its implementation. Petitioners, the Correction Officers Benevolent Association of the City of New York, Inc. and its President, Phillip Seelig, had challenged the program, which was initiated by a November 17, 1987 directive issued by the Commissioner.

In its statement of policy, the challenged directive, which covers "all members of the uniformed force... in-

cluding the Chief of Operations and the Commissioner", provides:

Correction Officers are peace officers and hold positions of public trust. The use of illegal drugs by officers is a breach of that trust and completely inimical to their status as peace officers.

* * *

The use of illegal drugs either on or off duty shall be cause for suspension without pay. Members on probation shall be terminated. Tenured members found guilty after an administrative hearing face penalties that include termination.

It further asserts that "the Department has documented a serious drug abuse problem among a significant number of its members", and notes that its purpose is the deterrence and detection of drug abusers for internal Departmental use, and not the facilitation of criminal prosecution.

In order to assure neutrality in the selection process, the directive provides for the computer generation of a list of Social Security numbers, programmed to select at random fifty members every two weeks. Thus, approximately 1,300 members will be tested every year. Since the Department currently has 7,100 tenured members, each member will be randomly selected, on average, once every five or six years.[1] After being selected, the employees will be notified to report for testing at the Health Management Division at a specific date and time. Failure to report or refusal to be tested or to cooperate with the testing procedure is cause for unpaid suspension. Probationers

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[1]The directive further provides, "Because the selection of members is made on a random basis, some members will never be tested during the course of a year. Other members may be selected more than once".

will be terminated, while tenured employees face discharge after a hearing.

The testing procedures in the directive are modelled after those adopted by the United States Department of Health and Human Resources for the Federal Government's drug-testing program—procedures that were recently upheld by the Supreme Court in *National Treasury Employees Union v. Von Raab* (489 US ____, 109 S.Ct. 1384). The directive enumerates a series of steps designed both to protect personal privacy and assure testing integrity. Each test is overseen by a uniformed supervisor or a Health Management Division staff member of the same gender as the employee being tested, who may have a union representative or lawyer present.

The employee is asked to furnish a listing of any medication, alcohol or food ingested within the preceding 24 to 72 hour period. Specimens are furnished, without observation, in a private closed stall. A supervising staff member is present, but remains outside the stall to receive the specimen, which is inspected for signs of irregularity or contamination. In addition, the toilet water in the stall is tinted blue to deter the dilution of specimens. A supervisor who suspects that an employee has tried to adulterate or substitute a specimen is to document his suspicions and order the employee immediately to provide another specimen under direct observation; both specimens are then sent to the laboratory. In any event, if the laboratory report indicates adulteration, that finding will provide the basis for disciplinary charges and re-testing under direct observation.

After concluding that the specimen is legitimate, the supervisor caps the container and seals and labels it in the presence of the employee, who initials both the label and any accompanying forms. In an effort to maintain an unbroken chain of custody, the Health Management Division has the responsibility of supervising the storage,

transportation and surrender of specimens to the laboratory for testing.

Specimens are to be tested for marijuana, cocaine, opiates, amphetamines, phenyclidine and barbiturates at an accredited laboratory by means of the thin layer chromatography test and the enzyme multiplied immunoassay technique. Positive findings must be confirmed by a different technique, a gas chromatography/mass spectrometry, which is apparently virtually infallible. Positive samples are to be kept for six months. An employee who has tested positive may arrange for retesting at a state-certified laboratory of his choice.

Petitioners, arguing that drug testing not based on individualized suspicion of usage constitutes an unconstitutional search and seizure, and relying largely upon this court's majority opinion in *Matter of Caruso v. Ward* (131 AD2d 214), subsequently reversed by the Court of Appeals (72 NY2d 432), and that court's decision in *Matter of Patchogue-Medford Congress of Teachers v. Board of Educ.* (70 NY2d 57), commenced the instant Article 78 proceeding to invalidate and enjoin implementation of the Commissioner's directive. Although they did not present any expert opinion or other evidence to support such contention, petitioners further argued that random testing is unnecessary, since the Correction Department's legitimate interests in deterring drug abuse in the uniformed force can be adequately satisfied by "a more aggressive program of educating superior officers in making observations with a view toward the detection of reasonable suspicion of possible drug usage. . .".

In their answer, which was supported by affidavits from Thomas Murray, the Correction Department's Chief of Operations, and Dr. Robert L. DuPont, a nationally recognized medical expert on drug testing, respondents cited, *inter alia*, the limited expectations of privacy of correction officers, the planned program's reliance upon

procedures that minimize privacy intrusions, the compelling government interest in deterring and detecting drug abuse, the evidence of an incipient drug problem within the Department that lesser measures had been unsuccessful in abating, and expert scientific opinion that reasonable-suspicion testing and other measures short of periodic testing are incapable of meeting the Department's needs.

The court hearing the matter conceded that respondents' interest in detecting drug abuse among correction officers was indeed substantial, but accepted petitioners' argument that alternative less intrusive measures, such as careful monitoring coupled with reasonable-suspicion testing or annual physical testing, would adequately meet the Department's deterrence and detection needs. Accordingly, it granted the petition and enjoined implementation of the directive.

We find, in light of the Department's compelling interest in deterring and detecting drug use among correction officers, whose diminished privacy expectations are outweighed by that interest, and its promulgation of detailed regulations which, with respect to such drug testing, are sufficient to prevent unbridled administrative discretion and to preserve privacy to the maximum extent feasible, that the Commissioner's plan is not constitutionally infirm. Accordingly, we reverse.

"'The operation of a correctional institution is at best an extraordinarily difficult undertaking.", (*People ex rel. Vega v. Smith,* 66 NY2d 130, 141, quoting *Wolff v. McDonnell,* 418 U.S. 539, 566.) Prisons are "fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." (*Bell v. Wolfish*, 441 U.S. 520, 559.) As this record discloses, the duties of a New York City correction officer are especially demanding. Working largely in a confined environment with violence-prone, anti-social in-

mates who, during any work period, outnumber them at least tenfold, correction officers have a responsibility to see that prisoners strictly conform to prison regimen and requirements; to protect the safety and security of inmates, prison personnel, visitors, and prison facilities; and, generally, to insure that sentences of incarceration properly fulfill their rehabilitative, deterrent, incapacitative, and punitive purposes.

The work of New York City correction officers mandates that they perform at optimum mental and physical levels. For example, they must have the mental acuity to perceive and defuse explosive situations, and to withstand, without overreaction, the torrent of inmate invective to which they are regularly subjected. A correction officer must be physically capable of utilizing a firearm or other weapon, if necessary, without endangering innocent parties, of intervening to break up fights between inmates, and of exercising vigilance when manning a tower guard post or searching visitors. The position also demands unquestioned integrity, given the endless opportunity for inmate corruption and the incalculable harm that could result.

That correction officers are prohibited from carrying weapons while performing ordinary patrol and supervisory duties is an indication of the peril of their working environment. They are, however, trained in the use of firearms and routinely carry guns while, for instance, performing perimeter guard duty, transporting prisoners, guarding hospitalized prisoners, and searching for escaped prisoners.

Since illegal drug use impairs a correction officer's vital mental and physical ability and compromises his integrity, thus paving the way for corruption and blackmail, the Department has long been concerned about drug usage by the members of its uniformed force. That the overwhelming majority of inmates with whom correction offi-

cers deal on a daily basis are either drug addicts or drug users only serves to compound the concern. Indeed, proffered statistics demonstrate that approximately 50% of the Correction Department's inmates are drug addicts, while 90% are at least drug users. Thus, drug-using correction officers have a ready and highly profitable market at hand for the peddling of drugs. Moreover, inmates and their visitors often offer drugs to correction officers as bribes. In 1988, for instance, 43 prison visitors were arrested on drug-related charges.

For a number of years now, the Department has apparently undertaken measures, including intensive educational efforts, to discourage drug use among its members and to weed out abusers. As a supplement to its longstanding reasonable suspicion drug-testing program, it adopted several across-the-board drug-testing programs. All applicants are tested for drug usage. Later, during their probationary period, they are subjected to more drug-testing, once during the first several weeks of their training and again at the conclusion of the probationary period. Since July of 1988, the Department has implemented two additional, random drug tests for its probationary officers. Thus, by the end of the eighteen-month probationary period, all correction officers are now drug-tested five times.

Notwithstanding these measures, the Department has concluded, on the basis of alarming statistical evidence, that random drug testing is imperative with regard to tenured correction officers. In the 32-month period between January 1, 1985 and August 31, 1987, for instance, drug-related disciplinary charges were brought against 149 tenured correction officers, over 1.1% per year of the tenured uniformed force. Similarly, in 1988, 88 tenured correction officers, over 1.2% of the force at the time, were either dismissed or forced to resign as a result of drug-related charges.

These percentages are all the more compelling since they represent, not the total number of drug offenders on the tenured force, but merely those against whom the Department, in the absence of any across-the-board drug-testing program for tenured officers, has been able to amass sufficient evidence to bring charges. Other evidence supports the Department's view that there are many more drug offenders on the force who have avoided detection. For example, between January 1, 1986 and August 31, 1987, a total of 2,411 probationary officers were tested at the training academy. Notwithstanding that all of them were given approximately one week's advance notice, 2.9% tested positive. Similarly, the past several years have witnessed a vast increase in the quantity of drugs successfully smuggled to inmates, an increase that, in the Department's view, can be explained only by the active participation of correction officers.

Moreover, recently conducted Departmental investigations have uncovered evidence of a large number of correction officers and other prison employees attempting to sell drugs to inmates. Since 1986, 312 officers have been dismissed for drug-use problems, and 20 have been arrested on charges related to drug sales. (*See, Prison Officers Tackle Thankless Job,* N.Y. Times, 2/19/89, p. 44, col. 4; N.Y. Newsday, 3/16/89, p. 19, col. 1.)

As this court has recognized, the Correction Department has a compelling interest in deterring drug abuse among the members of its uniformed force. (*See, Matter of King v. McMickens,* 120 AD2d 351, 353, *aff'd,* 69 NY2d 840.) Clearly, "the duties and responsibilities of correction officers . . . often [call] for the instantaneous availability, if not the use, of 'extraordinary physical effort' in the circumstances of their performance of service***." (*Matter of Figueroa v. Bronstein,* 38 NY2d 533, 535.) That effort, however, is adversely affected by drug use, which impairs not only physical performance,

whether in the use of firearms or otherwise, but also mental acuity and judgment, qualities of critical importance in dealing with prisoners. Furthermore, drug-using correction officers are easy victims of corruption and blackmail.

The Department's compelling interest in deterring drug abuse must be measured against the potential for such abuse among New York City correction officers. They are confined each day with violence-prone, anti-social inmates who greatly outnumber them, and against whom they must enforce a myriad of strict regulations. With the expansion of Departmental hiring over the past several years, most officers are quite young, in their early twenties, with relatively limited experience. Due to an ever increasing prison population, they are often required to work overtime. Indeed, even petitioner Seelig has been quoted as saying that correction officers "must work within standards that require more restraint than most people could endure." (*Prison Officers Tackle Thankless Job, supra,* N.Y. Times, 2/19/89, p. 44, col. 5.) In a society in which many of our citizens resort to drugs—so many, in fact, that studies indicate that six million use marijuana almost daily, 5.8 million use cocaine at least monthly, and one-sixth of the work force between the ages of 20 and 40 use marijuana at least monthly (N.Y. Times, 10/10/86, p. 14, col. 1)—it is fair to assume that, in a group subject to especially severe tensions, the temptation similarly to seek relief in illicit drugs will be strong. Compounding the risk is the correction officer's ready access to narcotics as a result of the environment in which he works.

Even though the constitutionality of an across-the-board drug-testing program does not turn on a showing of the inefficacy of less intrusive measures (*see, Skinner v. Railway Labor Executives' Assn,* 489 U.S. ____, 109 S.Ct. 1402, 1419 fn 9), the record here amply demon-

strates that reasonable-suspicion testing has not adequately met the Department's compelling needs. This inadequacy, of course, strengthens the governmental interest in the challenged program. In this regard, it should be noted that drug abuse frequently fails to generate the telltale signs that might otherwise give rise to reasonable suspicion. As Dr. Du Pont, the former Director of the National Institute of Drug Abuse and a preeminent national expert on the subject explains, unlike alcohol abuse, whose intoxication produces a general global brain defect that affects coordination, balance, speech, and fine movements, cocaine, marijuana and amphetamine abuse produces a type of intoxication which is difficult to detect, even by physicians, because it largely affects, not the primitive parts of the brain that control speech and motor functions, but, rather, those parts of the brain which control higher functions such as judgment, decision-making, reactivity and motivation. Intoxication of the latter type can have a devastating effect on the performance of a correction officer. While the balancing of interests may justify society's acceptance of the risk of such undetectable impairment with respect to some classes of government employees, in the case of correction officers the risks are too great.

The Supreme Court has acknowledged that reasonable-suspicion testing is an ineffective method for the deterrence of drug abuse among employees whose duties involve high-risks or hazards. In rejecting the argument that individualized suspicion of drug abuse is a constitutional prerequisite to the post-accident drug testing of railroad workers, the court held:

> [T]he government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that

> even a momentary lapse of attention can have disastrous consequences. * * * [E]mployees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the Agency found, will seldom display any outward "signs detectable by the lay person or, in many cases, even the physician." [Citation omitted.] This view finds ample support in the railroad industry's experience with Rule G, and in the judgment of the courts that have examined analogous testing schemes. *(Skinner v. Railway Labor Executives' Assn, supra,* 489 U.S at ____, 109 S.Ct. at 1419.)

Unlike *Matter of Patchogue-Medford Congress of Teachers v. Board of Educ., supra* (70 NY2d 57), where a school district, without even a single instance of drug abuse in its experience, sought to impose periodic drug testing on teachers, the drug problem among tenured correction officers is not speculative. As the statistical data reflects, the Department is confronted with a serious problem. Also alarming is the recent increase in the smuggling of drugs into prisons, an increase, already resulting in the death of at least one prisoner from a drug overdose that, in the Department's view, can be explained only by the participation of correction officers. Also disturbing are the deaths of several correction officers as a result of drug overdoses and the apprehension of others actually selling drugs in the Rikers Island parking lot.

On the basis of such a record, the Commissioner has concluded that the challenged random drug-testing program is the most appropriate of the various possible remedies to fulfill the Department's objectives. This considered administrative determination is entitled to substantial judicial deference. As the Supreme Court has noted:

> [T]he problems that arise in the day-today operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. (*Bell v. Wolfish, supra,* 441 U.S. at 547.)

Our Court of Appeals has similarly recognized that, in carrying out their "formidable tasks in the volatile setting of our correctional institutions", prison officials should "be vested with broad discretion in their formulation of security-related policies." (*Matter of Rivera v. Smith,* 63 NY2d 501, 512-513; *see, also, Matter of Doe v. Coughlin,* 71 NY2d 48, 59.)

In balancing the privacy interests of the correction officers against the compelling necessity for periodic drug-testing, we do not believe that the minimal intrusiveness of the challenged testing will seriously erode the officers, reasonable expectations of privacy. Not all governmental employees enjoy the same level of expectation of privacy. The privacy expectations of any particular group is markedly diminished by such factors as the employees' voluntary pursuit of a position they know to be pervasively regulated for reasons of safety and the employees' acceptance of severe intrusions upon their privacy. (*National Treasury Employees Union v. Von Raab, supra,* 489 U.S. ____, 109 S. Ct 1384; *Skinner v. Railway Labor Executives' Assn, supra,* 489 U.S ____, 109 S.Ct. 1402; *Matter of Caruso v. Ward, supra,* 72 NY2d at 440.) Correction officers are traditionally among the most heavily regulated groups of governmental employees and also among those who accept the greatest intrusions upon their privacy. A number of courts have held that correction of-

ficers, because of the confined environment in which they work, the strict security measures governing their conduct, and the other distinctive features of their employment, have diminished expectations of privacy with regard to security-related employer intrusions. (*See, e.g., Poole v. Stephens,* 688 F Supp 149, 155; *Policemen's Benev. Ass'n of N.J. v. Washington Tp.,* 672 F Supp 779, 793, *rev'd on other gds.,* 850 F2d 133, *cert. den.,* ____U.S.____, 57 USLW 3653.)

For example, unlike most employees, New York City correction officers are subject to call at any time and must be fit for duty except when on sick leave. (Rules and Regulations of the New York City Department of Correction, Rule 3.15.020.) Whenever they report sick, they must submit to an examination at home by a Department physician. (*Id.,* Rule 3.10.080.) While on sick leave, they are prohibited from leaving their homes except to visit a doctor or hospital or to obtain medication. (*Id.*) Furthermore, unlike ordinary employees, correction officers are mandated by the Department to satisfy all of their private financial obligations or face Departmental discipline. (*Id.,* Rule 3.25.020.)

In the absence of express permission, correction officers are absolutely forbidden to carry packages into or out of prisons. (*Id.,* Rule 3.15.160.) When permission is granted, the package must be inspected when the officer leaves or enters the facility. (*Id.,* Rule 5.20.050.) Moreover, any car driven by a correction officer into or out of prison facilities is searched for contraband each time. (*Id.*) Likewise, all lockers used by correction officers are regularly searched. (*Id.,* Rules 5.202.090, 5.20.100.) In addition, a correction officer is, himself, subject to search at any time and force may be used if he refuses to cooperate. (*Id.,* Rule 5.20.090.) An officer is also prohibited from engaging in undue familiarity with or doing favors for inmates and making or maintaining any contact with

former inmates. (*Id.*, Rules 3.60.010, 3.60.030, 3.60.040, 3.60.050.)

In addition, all correction officers are notified before applying for the position and on numerous occasions thereafter that illegal drug usage is absolutely prohibited and will result in applicant disqualification or employee termination, and that drug testing is employed to detect such usage. Moreover, unlike the testing plan designed here, where samples are obtained without observation under conditions which limit the intrusion on personal privacy, each of the five pre-tenure tests involves the furnishing of samples under direct observation and, hence, represents a greater incursion upon privacy. Having been subjected to these five observed drug tests, a correction officer's expectation of privacy with regard to the plan to administer less intrusive periodic drug tests to each tenured employee once every several years is significantly diminished. (*See, Matter of Caruso v. Ward, supra,* 72 NY2d at 435, 439.)

Recent court decisions refute petitioners, premise that, in the absence of individualized suspicion of drug abuse, drug testing is unconstitutional and otherwise support the constitutionality of the challenged program. *National Treasury Employees Union v. Von Raab, supra* (489 U.S. ____, 109 S.Ct. 1384) involved a challenge to the constitutionality of the United States Customs Service's program of administering drug tests, without a reasonable suspicion predicate, to employees seeking promotion or transfer to positions that involve either interdiction of drugs, carrying of firearms, or access to classified information. The program, aimed at both deterrence and detection, was not based upon any palpable drug problem within the agency. In fact, previously administered drug tests had yielded positive results in only about 0.1 of 1% of the cases.

The court noted that if a search otherwise implicating the Fourth Amendment serves special needs beyond those of law enforcement, as is the case of employee drug testing, individualized suspicion may not be constitutionally required where the government interest outweighs the intrusiveness upon the reasonable expectations of privacy. The court found that the governmental interests at stake were compelling, citing, *inter alia,* the employees' exposure to the criminal element and bribes, the grave dangers posed by the possible misuse of deadly force, and the potential evils resulting from those with access to sensitive information being compromised. The court also took note of the Court of Appeals' decision in *Matter of Caruso v. Ward, supra* (72 NY2d 432) and the employees' voluntary pursuit of positions they knew required extraordinary assurances of trustworthiness and probity, as well as the unobserved nature of the testing program and other characteristics that both assure reliability and minimize embarrassment. In expressly rejecting the argument that in the absence of proof of a substantial drug problem within the agency, individual suspicion should be a prerequisite to testing, the court cited the difficulty of detecting drug use through mere observation. It noted, "Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." (109 S.Ct. at 1395.)

In *Skinner v. Railway Labor Executives' Assn., supra* (489 U.S. ____, 109 S.Ct. 1402), which involved the constitutionality of post-accident drug testing of railroad workers without a particularized suspicion of drug abuse, the court, finding the governmental interest at stake to be substantial since such employees "can cause great human loss before any signs of impairment become noticeable to supervisors or others" (*id.* at 1419), stated, "In limited

circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *(Id.* at 1417.) As in *Von Raab,* the court found that the testing intruded insubstantially upon the workers' expectations of privacy because of the limited nature of those expectations as a result of their voluntary selection of positions they know to be pervasively regulated for reasons of safety and the lack of direct observation of the sample giving and other features of the testing program that minimize intrusiveness.

Like the classes of employees involved in *Von Raab* and *Skinner,* correction officers have voluntarily chosen occupations known to be pervasively regulated and which demand the utmost assurance of integrity and fitness. Indeed, if anything, correction officers surrender far more of their expectations of privacy than do members of those classes by virtue of, *inter alia,* their working in a confined environment and participation in five pre-tenure, direct-observation drug tests. Furthermore, the governmental interests at stake in the deterrence and detection of drug abuse among correction officers are at least as strong as those in *Von Raab* and *Skinner.* Moreover, in contrast at least with *Von Raab,* there is in this record the supporting evidence of a disquieting and escalating drug problem.

While both *Von Raab* and *Skinner* concededly address the issue of whether reasonable suspicion is indispensable to drug testing, neither expressly treats the question of periodic testing. There is, however, strong indication that the Supreme Court would regard periodic testing as equally constitutional for the classes of employees involved as the precise programs considered.

Particularly telling in this regard is the heavy emphasis in *Skinner* on the deterrent value of the post-accident test-

ing program: "By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect***." (109 S.Ct. at 1420.) In *Skinner*, all covered railroad workers were forewarned that they would be tested upon the occurrence of certain types of accidents. Since no employee could predict when such an accident would occur and, thus, when testing would be ordered, the program, in effect, was one resembling random testing where employees are forewarned that they will be selected for testing in the future based upon a triggering event which they cannot predict. The essential difference in the two programs is that the unpredictable triggering event in one is an accident, while, in the other, the selection of one's number by a computer.

Also significant is the court's citation with approval in *Von Raab* of the Court of Appeals' decision in *Matter of Caruso v. Ward, supra* (72 NY2d 432), which upheld a program involving the random, periodic testing of members of the Police Department's Organized Crime Control Bureau (OCCB), an elite unit, the majority of whose members concentrate on narcotics-related crimes. Out of 1173 members, drug-related disciplinary charges had been filed against a total of ten during a period of four years. The program called for the furnishing of samples under the direct observation of a monitor. Having found the giving of a specimen in the presence of a government official or agent as "at least as intrusive as a strip search" in *Matter of Patchogue-Medford Congress of Teachers v. Board of Educ., supra* (70 NY2d at 67-68), the court framed the issue in *Caruso* as: "The central question for us (is) whether a privacy intrusion that we characterized as being at 'least as intrusive as a strip search' may, on this record, be justified so as to permit random drug testing of OCCB members." (72 NY2d at 439.)

In finding the privacy expectations of OCCB members to be insubstantial, the court cited their voluntary decision to join a highly sensitive unit of a paramilitary organization, their acceptance of being on call 24 hours per day and of other restrictions that intrude upon their privacy, and their participation in four observed suspicionless drug tests prior to joining the unit. The court also found the governmental interests at stake compelling, in light of the members' exposure to drug users and traffickers, the risks of perfidious exchanges of classified information and diversion of drugs and the potentially fatal consequences to fellow officers and others as a result of misuse of a weapon. It specifically rejected the contention that the less intrusive measure of reasonable-suspicion testing should be deemed sufficient, noting that the inadequacy of such testing as a deterrent was demonstrated by the evidence of ten drug-related cases which occurred in spite of the reasonable-suspicion testing program.

The case for the drug-testing program is, on the whole, more compelling here than in *Caruso*, where the incidence of drug-related disciplinary cases, ten over four years among a unit of 1173 members, represents a rate of 0.2 of 1% per year, contrasted with a known incidence among tenured New York City correction officers of 1.2% per year. The governmental interests at stake here are undeniably strong. Like their OCCB counterparts, correction officers, if physically impaired, can cause serious harm through misuse of their firearms or otherwise. Furthermore, a drug-caused impairment of judgment is just as potentially dangerous in the case of correction officers, who are often called upon to quell explosive situations. In addition, correction officers are similarly heavily exposed to drug offenders and, as a result of bribery or blackmail, can well endanger security and frustrate penological ends by, for instance, leaking confidential information, facilitating escapes and attacks upon informers, and either

smuggling, or allowing the smuggling of, contraband into prisons.

Finally, we note that although the court in *Caruso* found it necessary to refrain from a blanket endorsement of the program at issue there because the absence of regulations prevented the court from reviewing "each of the implementing details" (72 NY2d at 441-442), the instant program is supported by a detailed set of regulations, substantially similar to the Federal regulations approved by the court in *Von Raab*, which attempt to preserve privacy and insure reliability and accuracy.

By focusing on the factual predicate which the Court of Appeals found justified the random drug testing in *Caruso, viz*, the involvement of the affected elite police unit in investigating drug trafficking on a daily basis, the dissent argues that the facts here do not justify such testing. Such a narrow construction ignores the salient facts in this case—the compelling evidence of significant drug abuse among correction officers, as well as the escalation of drug smuggling in the City's prison facilities. If the reference point for discussion on this issue is to be whether an employee, by the very nature of his work, is exposed to drugs, then, on this record, the random drug testing of correction officers is justified. The argument that random drug testing is unnecessary because correction officers work in a self-contained environment and are thus closely scrutinized is belied by the empirical evidence. In any event, we do not believe the Court of Appeals has so limited the issue. The essence of the decisions in *Caruso* and *Patchogue*, also relied upon by the dissent, is that the governmental interest in random drug testing must be substantial and the privacy interests implicated minimal. Such a standard has been met here, especially in light of the program's safeguards against unfettered incursions into the officers' reasonable expectations of privacy.

The overwhelming majority of courts that have considered programs for the random, periodic testing of governmental employees engaged in high-hazard or high-risk activities have upheld such programs. In *McDonell v. Hunter* (809 F2d 1302), for instance, the Eighth Circuit upheld a program for the random, periodic drug testing of correction officers having regular contact with prison inmates, even though the program was wholly prophylactic in nature and there was no evidence at all of a drug problem among the officers. In *Weicks v. New Orleans Police Dept.* (706 F Supp 453), the court, without any evidence of a drug problem, upheld the random drug testing of all members of certain police units, including the public affairs and the special integrity divisions, as well as the special investigations and internal affairs units. In *Transport Workers, Local 234 v. S. E. Pa. Tr. Auth.* (863 F2d 1110, *aff'g* 678 F Supp 543), the Third Circuit upheld the random testing of transit workers, including transit police officers. Out of a class of 4440, there was evidence that eight used drugs in 1986 and three used drugs in the first half of 1987. In *Guiney v. Roache* (873 F2d 1557 [1st Cir.]), the court upheld random drug testing of police officers who carry firearms as well as those who participate in drug interdiction and, in light of *Skinner v. Railway Labor Executives Assn., supra*, remanded for further consideration as to the other members of the Department. In *National Federation of Federal Employees v. Cheney* (___ F2d ___ [D.C. Cir.]), the same court sanctioned the testing of several classes of civilian employees of the military: transportation workers, including air traffic controllers, pilots, and aviation mechanics and aircraft attendants; law enforcement personnel, specifically those engaged as police officers and guards; and the direct service treatment staff of the Alcohol and Drug Abuse Prevention and Control Program. In *Jones v. Jenkins* (878 F2d 1476 [D.C. Cir.]), the court upheld, on the basis of

repeated incidents of drug related behavior, the testing of school bus attendants. (*See, also, Policemen's Benev. Ass'n of N.J. v. Washington Tp., supra*, 850 F2d 133 [upholding random testing of all police officers, even though no evidence that any police officer ever used drugs]; *Rushton v. Nebraska Power Dist.*, 844 F2d 562 [upholding random testing of nuclear power plant workers having access to sensitive information; evidence that two out of 700 in class had used drugs); *Committee for GI Rights v. Callaway*, 518 F2d 466 [upholding random testing in the military]; *Brown v. City of Detroit*, 715 F Supp 832 [upholding the random testing of police officers]; *Ensor v. Rust Engineering Co.*, 704 F Supp 808 [upholding random testing of nuclear plant workers]; *Poole v. Stephens, supra*, 688 F Supp 149 [upholding random testing of probationary correction officers]; *Fraternal Order of Police v. City of Philadelphia*, ____ F Supp ____ [approving random testing of police officers]; *American Federation of Govern. Emp. v. Dole, 670 F Supp 445, affd sub nom. American Federation of Govern. Emp. v. Skinner*, ____ F2d ____ [approving random testing of critical employees of U.S. Department of Transportation, including law enforcement personnel]; *Mulholland v. Department of Army*, 660 F Supp 1565 [upholding random testing of civilian Defense Department aviation employees, law enforcement personnel, armed guards, and handlers of toxic chemicals; evidence that sixteen aviation employees had used drugs]; *National Ass'n of Air Traffic Specialists v. Dole*, # A 87-073, unpublished slip op. [upholding annual suspicionless testing of flight service specialists, who convey certain information to pilots; evidence that 45 in class of 26,500 had used drugs]; *City of East Point v. Smith*, 258 Ga. 111, 365 SE2d 432 [upholding random testing of police officers; evidence showed that only a few officers had used drugs].)

In conclusion, we find that the random drug-testing program at issue is a limited one, compelled by a worsening drug problem affecting a group of quasi-military personnel upon whose mental acuity and physical fitness lives depend, and who have voluntarily chosen an occupation which already imposes significant intrusions on their privacy. Moreover, the program is conservatively designed to prevent unbridled discretion in selection and to preserve privacy to the maximum extent feasible. In such circumstances, it is not constitutionally deficient.

Accordingly, the judgment of the Supreme Court, New York County (Karla Moskowitz, J.), entered on or about October 20, 1989, granting the petition and enjoining implementation of the November 17, 1987 directive providing for random drug testing, should be reversed, on the law, without costs or disbursements, and the petition dismissed.

All concur except Milonas and Ellerin, JJ. who dissent in an Opinion by Milonas, J.

MILONAS, J. (Dissenting)

Confronted with the fact that pervasive drug abuse is justifiably perceived as this nation's number one problem, the temptation is to seek solutions by diluting civil liberties. However, this court cannot venture beyond the authority of the Court of Appeals and the United States Supreme Court to sanction the random drug testing of corrections officers. It is axiomatic that urinalysis for purposes of drug screening is a search which is subject to constitutional scrutiny. In New York State, the law pertaining to drug testing remains that enunciated by the Court of Appeals in *Matter of Caruso v. Ward,* 72 NY2d 432, and *Matter of Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Free School District,* 70 NY2d 57. Unless the Court of Appeals announces a new standard, we are required to

follow the law which has been established in our state. In that regard, in *Matter of Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, supra,* the Court of Appeals invalidated a directive by respondent School District requiring all probationary school teachers to submit to urinalysis to detect possible drug abuse, declaring (at 70) that:

> The State has a legitimate interest in seeing that its employees are physically fit and that their performance is not impaired by illegal drug usage. The State also has a manifest interest in preventing crime and seeing that those who violate the law are brought to justice. There is little question that these goals would be more obtainable if the State were able to search everyone periodically in an all-inclusive dragnet. If random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so. By restricting the government to reasonable searches, the State and Federal Constitutions recognize that there comes a point at which searches intended to serve the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy, dignity and security of its members. Thus random searches conducted by the State without reasonable suspicion are closely scrutinized, and generally only permitted when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subjected to unregulated discretion. . . .

More recently, the Court of Appeals in *Matter of Caruso v. Ward, supra,* again had occasion to consider the issue of drug testing when it upheld periodic random urinalysis of members of an elite voluntary corps within the New York City Police Department known as the organized Crime Control Bureau (OCCB). According to the Court therein (at 439):

> We observed in *Patchogue* that all public employees have some diminished expectations of privacy in respect to inquiries by the State into their physical fitness to perform on the job. . . . The privacy expectations of police officers must be regarded as even further diminished by virtue of their membership in a paramilitary force, the integrity of which is a recognized and important State concern. . . . Indeed, this Court has held that "[i]t is well established that it is within the State's power to regulate the conduct of its police officers even when that conduct involves the exercise of a constitutionally protected right" *(Matter of Morrisette v. Dilworth,* 59 NY2d, at 452 *supra).* On the other hand, the special status of police officers does not alone reduce their expectation of privacy to "minimal" level in respect to random drug testing. Rather, their status, considered with the substantial privacy intrusions to which these particular OCCB members and applicants already have subjected themselves, reduces their privacy interest to a minimal or insubstantial level such that the admittedly crucial State interest justifies the random testing.

However, the crux of the decision in *Matter of Caruso v. supra,* was the fact that "[c]learly, there is a direct correlation between the substantive work of an OCCB mem-

ber and drugs that must be considered in evaluating the magnitude of petitioners' privacy interest in not being tested for drug use on the job" (at 440). Significantly, members of the OCCB are in constant contact with those who deal in and abuse drugs, as well as with large quantities of the illegal substances themselves. It is precisely because OCCB officers are so consistently exposed to drugs and those who traffic in drugs that members of this elite group are distinguishable from other police officers, who may not be randomly tested in the absence of reasonable suspicion. Indeed, correction officers, while certainly members of a paramilitary force, are even less exposed to illegal substances than are ordinary police officers since the former operate in a closed, supposedly drug-free environment, and they are not involved in interdicting drug trafficking.

Respondents herein do not allege that city jails are permeated with drug dealing and the use of illegal substances. Indeed, while most of the inmates may have a history of substance abuse, the jails themselves are expected to be insulated from drugs, a fact which respondents do not challenge. Rather, they claim that there is evidence that 1.2 percent of all tenured correction officers and 2.9 percent of probationary officers are drug users. In view of the close and continuous supervision under which correction officers work, observation which is much more intense than that placed upon police officers, both those in special units and otherwise, it can scarcely be found that respondents have demonstrated interests sufficient to justify the random testing of all correction officers.

Not only are correction officers not exposed to the constant temptation encountered by police officers, especially members of such an elite corps as OCCB, who are daily presented with drug transactions, but virtually all of their actions are scrupulously monitored by their superiors. In

addition, the Rules and Regulations of the New York City Department of Corrections permit searches of correction officers, lockers, cars, personal property and even of their persons while they are on duty. Thus, it is exceedingly difficult for correction officers to transport illegal substances into or out of the facility or to possess drugs while on the job. Yet, respondents propose that all members of the uniformed force of the Corrections Department, both those who are in the ranks and those who hold supervisory positions, should be compelled to undergo random urinalysis without the existence of any reasonable individualized suspicion. Moreover, they do so simply on the basis that of their closely observed uniformed staff, hardly more than one percent of their permanent force has been known to indulge in illegal substances and that the nature of a correction officer's job in itself requires stringent scrutiny, including drug testing. Respondents would, consequently, impose the drastic intrusion into an individual's privacy rights entailed by random drug testing in an effort to eliminate a problem which, without minimizing its severity, is posed by only a minute proportion of its uniformed staff. It is urged that because the correction officers' workplace, by its very nature, curtails their expectation of privacy, then the right to privacy can be further abridged by random drug testing. This argument ignores the fact that the environment in which correction officers labor greatly diminishes the need for testing. It is ironic that the precise rationale offered for screening—the reduced expectation of privacy—provides a compelling reason against its necessity.

However, neither the New York State Court of Appeals nor the United States Supreme Court has ever permitted the random drug testing of the entire work force of a department or agency. Where such screening has been authorized, there has been either a reasonable suspicion that the employee being examined has been using drugs or

there is a direct correlation between the duties being performed (i.e. they are armed law enforcement personnel) and the use or availability of drugs. Respondents concede that the two leading United States Supreme Court cases dealing with the legality of urinalysis, *Skinner v. Railway Labor Executors Association,* 489 U.S. ____ (March 21, 1989), and *National Treasury Employees Union v. Von Raab,* 489 U.S. ____ (March 21, 1989), do not concern the sort of unlimited random testing which they wish to implement herein. In *Skinner v. Railway Labor Executives Associates, supra,* the Supreme Court allowed the testing of railroad workers involved in certain train accidents or violations of safety rules, whereas in *National Treasury Employees Union v. Von Raab, supra,* the issue was the testing of customs agents seeking transfer or promotion to certain positions.

It should be noted that in jurisdictions other than New York, legal authority, prior to *Skinner* and *Von Raab*, differs with respect to the validity of randomly testing government workers for drug use. Thus, advocates both for and against the suspicionless screening of various types of public employees can find ample support in the law in favor of their position in that there are numerous cases existing on both sides of the argument. In the short time that has elapsed since *Skinner* and *Von Raab* were decided, a trend appears to be evolving among courts considering this matter to sanction the random testing of at least two general categories of public employees, those in the uniformed forces, particularly police officers; and transportation workers, extending not only to operators but even to those who service vehicles, trains, aircraft, etc., such as mechanics and engineers. A more specialized group of personnel also now deemed to be subject to random drug screening are individuals holding top secret national security clearance. The reason for this development is that in *Skinner* and *Von Raab*, the Supreme Court rec-

ognized three governmental interests which, in appropriate circumstances, might be sufficiently compelling to justify mandatory testing in the absence of individualized suspicion; that is, its concern with maintaining the integrity of the work force, with enhancing the public safety and with protecting truly sensitive information. Accordingly, the first of these interests—ensuring the integrity of the work force-warrants the testing of employees involved in drug interdiction, whereas the second—advancing the public safety—justifies the screening of workers who carry firearms.

In *Guiney v. Roache*, 873 F.2d 1557 (May 11, 1989), the First Circuit Court of Appeals, relying upon *National Treasury Employees Union v. Von Raab, supra*, sustained the random testing of at least those officers in the Boston Police Department who carry firearms and participate in drug interdiction, finding no relevant distinction in that regard between police officers and customs officers. Similarly, a United States District Court, in *Brown v. City of Detroit*, 715 F.Supp. 832 (July 13, 1989), upheld the drug testing of the Detroit police on the ground that they carry guns and use deadly force. The District Court of the District of Columbia, however, in *Hartness v. Bush*, 712 F.Supp. 986 (May 19, 1989), disallowed the random testing of unarmed employees of the General Services Administration and Executive Office of the President as overly broad. A California District Court, in *American Federation of Government Employees, AFL-CIO, Council 33 v. Thornburgh*, ____ F.Supp. ____ 11, 1989), held (Sept. 11, 1989) held that the mandatory urinalysis proposed by the Federal Bureau of Prisons of all employees irrespective of position was not supported by objective evidence, as in *Skinner v. Railway Labor Executors Association, supra*, nor targeted at workers who perform specific job functions, as in both *Skinner* and *National Treasury Employees Union v. Von Raab, supra*.

In *American Federation of Government Employees v. Skinner*, ____ F.2d ____ (Sept. 8, 1989), the Circuit Court of Appeals for the District of Columbia Circuit approved the drug testing of air traffic controllers and other transportation employees, including mechanics, inspectors, engineers and motor vehicle operators, because these employees occupied health and safety related positions. That same court, in *National Federation of Federal Employees v. Cheney*, ____ F.2d ____ (Aug. 29, 1989), had previously permitted the United States Army to proceed with the testing of three types of civilian employees: 1) transportation workers, such as air traffic controllers, pilots, aviation mechanics and aircraft attendants, since the Army has a compelling interest in public safety and security, 2) personnel in occupations pertaining to law enforcement, specifically civilian police and guards, and 3) the civilian direct service treatment staff of the Alcohol and Drug Abuse Prevention and Control Program. The District of Columbia Circuit, on the other hand, rejected the attempt by the United States Department of Justice to randomly test all prosecutors in criminal cases or employees with access to grand jury proceedings but did authorize the screening of personnel having top national security clearance (*Harmon v. Thornburgh*, 878 F.2d 484 [June 30, 1989]). In another case, that same Circuit, upon remand by the United States Supreme Court in *Jenkins v. Jones*, ____ U.S. ____ (April 4, 1989), upheld the testing of District of Columbia school bus attendants engaged in the transportation of handicapped children after the Supreme Court found the record to include evidence of repeated incidents of bizarre or drug related behavior on the part of these workers (*Jones v. Jenkins*, 878 F.2d 1476 [June 27, 1989]). Finally, the District of Columbia District Court, in *American Federation of Government Employees AFL-CIO v. Cavazos*, ____ F.Supp. ____ (July 26, 1989), allowed the United States Department of Edu-

cation to test a guard, motor vehicle operators and employees with access to sensitive information, but the screening of automatic data processors was not permitted under the access-to-sensitiveinformation rationale.

New York City correction officers, it is important to point out, although they are peace officers, do not routinely bear weapons on the job or interdict controlled substances and have not been identified as particularly subject to drug abuse. They are also not involved in the maintenance of public safety in the same manner as are transportation workers. Consequently, none of the foregoing recent cases would appear to be directly relevant to the situation before us now. At any rate, this court is bound by the dictates of the New York State Court of Appeals. While it may very well be that, in view of *Skinner v. Railway Labor Executors Association, supra*, and *National Treasury Employees Union v. Von Raab, supra*, the Court of Appeals will eventually decide to depart from the standards which it has set forth in *Matter of Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, supra*, and *Matter of Caruso v. Ward, supra*, we should not anticipate the Court of Appeals, particularly when confronted with an issue so vital as the constitutional guarantees afforded by the Fourth Amendment. Moreover, it is entirely conceivable that the Court of Appeals may conclude that the constitution of this state mandates a more stringent interpretation than that placed on the federal constitution by the United States Supreme Court and other federal courts (see *People v. Torres*, ____ NY2d ____[decided on July 11, 1989]). Regrettably, the majority in the instant matter have proceeded further than the New York State Court of Appeals in weakening the right of public employees, which they share in common with all other citizens, to privacy and to be free from unreasonable searches and seizures. In my

opinion, there is no legal support in this jurisdiction for the random drug screening program intended by respondents, and the judgment of the Supreme Court should, therefore, be affirmed.

Order filed.

Order and Opinion of New York Court of Appeals

Decided May 8, 1990

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 106

In the Matter of Phillip Seelig, as President of the Correction Officers Benevolent Association of the City of New York, Inc., *et al.*,

Appellants,

v.

Richard J. Koehler, as Correction Commissioner of the City of New York, *et al.*,

Respondents.

Irving Anolik, Barbara H. Daly, NY City, for appellants.

Victor A. Kovner, NYC Corporation Counsel (Michael S. Adler, Francis F. Caputo of counsel) for respondents.

BELLACOSA, J:

The New York City Commissioner of Correction promulgated a random urinalysis drug-testing program for all uniformed officers because, "[i]n spite of an aggres-

sive drug prevention education program and testing procedures, including an aggressive reasonable suspicion testing program, the Department has documented a serious drug abuse problem among a significant number of its members." (Rec on App, at 30 [Commissioner's Directive, 11-17-87]). The union representing the guards and its president brought this article 78 proceeding to block the implementation of the program on Fourth Amendment grounds. State Supreme Court granted the petition and enjoined the testing. The Appellate Division reversed and dismissed the proceeding, with two justices dissenting. Petitioners appealed as of right, and we granted a stay of implementation of the program pending the outcome of this appeal. We now affirm and uphold the random drug-testing program of the New York City Correction Department.

THE CONTEXT

In 1987, this Court grappled with the constitutional implications of random drug testing of probationary school teachers and held that urinalysis drug testing could proceed only on the reasonable suspicion predicate (*Matter of Patchogue-Medford Congress of Teachers v Bd. of Educ.*, 70 NY2d 57). We disapproved random searches there and observed that they "are closely scrutinized, and generally only permitted when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subject to unregulated discretion" (*id.*, at 70 [emphasis added]). The following year, this balancing analysis was applied to a particular subset of public employees—the Organized Crime Control Bureau (OCCB) of the New York City Police Department—in *Matter of Caruso v Ward* (72 NY2d 432). The Court concluded—in the presence of "factors

* * * which take this case out of *Patchogue*"—that random drug testing was not unconstitutional (*id.*, at 439). Special emphasis was given to the diminished level of Fourth Amendment expectations of those employees.

In this case also, each aspect of the *Patchogue-Caruso* exception test is met. We agree with and note especially this cogent summary in Justice Sullivan's majority opinion below:

> We find, in light of the Department's compelling interest in deterring and detecting drug use among correction officers, whose diminished privacy expectations are outweighed by that interest, and its promulgation of detailed regulations which, with respect to such drug testing, are sufficient to prevent unbridled administrative discretion and to preserve privacy to the maximum extent feasible, that the Commissioner's plan is not constitutionally infirm (M/O *Seelig v Koehler*, 151 AD2d 53, 57).

Our holding today, despite the hyperbolic attributions of the dissenting opinion, does no more than conclude that the particular combination of crucial circumstances comprising the paramilitary workplace milieu of jail guards, their severely diminished privacy expectations under a sedulous set of testing procedures, in the face of the significant state interest, satisfy the analytic and constitutional underpinnings of *Patchogue* and *Caruso*—a concededly rigorous set of standards. Key factors, peculiar to this case, which we conclude are sufficient to warrant the substantial intrusion of random testing searches, include:

- The employment is in a unique, high-risk, hazardous setting,

- The guards have voluntarily agreed to submit to a previously enacted series of urinalysis, both random and suspicion-base,

- The guards are already subject to a host of intrusive searches of person and property with no suspicion predicate;

- The Commissioner has demonstrated drug use in his ranks and inability to stop with currently available procedures;

- A guard's usage increases substantially the inherent dangerousness of illicit drugs, putting at risk the lives of inmates and fellow officers;

- A drug-compromised guard establishes a two-way security breach—drugs and weapons are more easily gotten into jail and prisoners can more easily be gotten out;

- The challenged testing procedures guard the privacy and dignity of the subjects as carefully as possible;

- The accuracy and integrity of the test results are meticulously circumscribed;

- A significant appeals process is granted to those who test positive.

Nevertheless, these City of New York jail guards make the argument that they may not be tested for drugs unless the City can show individualized reasonable suspicion. Their claim rests on State and Federal constitutional guarantees against unreasonable search and seizure which apply to urinalysis drug testing (NY Const, Art 1, §12; US

Const, Amend IV; *Matter of Caruso v Ward,* 72 NY2d 432, *supra; Matter of Patchogue-Medford Congress of Teachers v Bd. of Educ.,* 70 NY 2d 57, *supra; Nat'l Treasury Employees Union v Von Raab,* 489 US ____, 109 S Ct 1384, *Skinner v Ry. Labor Executives' Assn.,* 489 US ____, 109 S Ct 1402).

THE PRIVACY INTEREST

Applicants pursue employment as jail guards with understanding and acceptance of invasions of personal privacy unknown and unacceptable in the civilian world. We note another particularly apt portion of the majority opinion below:

> Not all governmental employees enjoy the same level of expectation of privacy. The privacy expectations of any particular group is markedly diminished by such factors as the employees' voluntary pursuit of a position they know to be pervasively regulated for reasons of safety and the employees' acceptance of severe intrusions upon their privacy. [*National Treasury Employees Union v Von Raab,* 489 US ____, 109 S Ct 1384, *supra,* 72 NY2d, at 440]. Correction officers are traditionally among the most heavily regulated groups of governmental employees and also among those who accept the greatest intrusions upon their privacy. A number of courts have held that correction officers, because of the confined environment in which they work, the strict security measures governing their conduct, and the other distinctive features of their employment, have diminished expectations of privacy with regard to security-related employer intrusions. [see, e.g., *Poole v Stephens,* 688 F Supp 149, 155; *Policemen's Benevolent Assn. v Towns-*

hip of Washington, 672 F. Supp 799, 793, revd on other grounds 850 F2d 133, cert denied ____ US ____, 109 S Ct 1637.] (*Matter of Seelig v Koehler*, 151 AD2d 53, *supra*, at 62).

Before achieving tenure, Department of Correction employees currently undergo five urinalyses—one each at the beginning and end of an 18-month probation period, and three random tests during probation. In these pre-tenure urinalysis, a supervisor directly observes the production of the specimen. In the protocol at issue, the specimen is collected behind a closed door in a private stall. Notably, the invalidated procedure in *Patchogue* and the validated one in *Caruso* involved direct observation. Petitioners, however, concede the necessity of the more intrusive pre-tenure program and they do not challenge its constitutionality (see, Rec on App, at 22 [Petition, para 18]; see also, *Matter of McKenzie v Jackson*, ____ NY2d ____ [slip opn, decided today]). We note, too, that the OCCB officers also underwent at least three pre-tenure drug tests, a significant factor leading to our conclusion that "the substantial privacy intrusions to which [they] already have subjected themselves [ ] reduce [ ] their privacy interest to a minimal or insubstantial level such that the admittedly crucial State interest justifies the random testing" (*Matter of Caruso v Ward*, 72 NY2d, *supra*, at 439-440). The "unique" circumstances of the OCCB officers in *Caruso* do not diminish the ratio decidendi of that case or the exception principle from *Patchogue* on which *Caruso* built its holding. Of course, the facts in this case are different, as is so with all subsequent cases in which a precedent—the holding—is applied in the traditional common law process. Thus, the unique fact-specific application here is no less a narrow exception in the *Patchogue-Caruso* line and represents no "abandoning" of the appropriate constitutional analysis (see, Dissenting opin-

ion, at 2). Also, the number or categories of particular public employees' groups is not alone dispositive. Rather, the identification of weighing of all the unique and particular facts of each case governs.

The extremely diminished privacy expectations of the jail guards in this case is initially no less than that of the OCCB members. We added this admonition in *Caruso*: "our decision in no way impinges on the Fourth Amendment rights to be secure against unreasonable searches and seizures of OCCB officers' persons, homes, cars, lockers or other personal effects under traditional probable cause standards" (*Matter of Caruso v Ward, supra*, at 442 [citation omitted]). In those respects, the entire jail guard force has yielded even more privacy protections than the OCCB cadre. For example, the Rules and Regulations of the New York City Department of Correction provide that an officer is subject to search at any time, and force is authorized if the officer is not cooperative (Rule 5.20.090). Any car driven by a correction officer in or out of jail facilities is subject to search, as is any package for which the officer has been given permission to carry into or out of a jail (Rule 5.20.050). Correction officers' lockers are regularly searched (Rule 5.20.090). It can be confidently stated, therefore, that these jail guards retain the barest minimal privacy expectation, not because they should be afforded any lesser status or constitutional protection and not because they are being treated as "prisoners," but because it is inherent in their freely chosen work and work conditions. We do not doubt that the majority of these guards are certain to be law abiding, drug free and commendably committed to their tough public jobs. Nevertheless, they suffer a reduced order of constitutional circumspection proportionate to their accepted level of humble privacy expectations.

The State Interest

In *Matter of Caruso v Ward* (72 NY2d, *supra*), we observed that "(t)he terror-filled world [OCCB members] are working in requires the sternest precautionary safeguards to weed out drug abusers from their own ranks" (*id.*, at 441). Yet they work outside in the streets and communities. Jail guards, on the other hand, daily toil among incarcerated individuals, many of whom will pay any price and do any deed to escape or to ameliorate their confinement. A prison is a "unique place fraught with serious security dangers" (*Bell v Wolfish*, 441 US 520, 559), and its operation "is at best an extraordinarily difficult undertaking" (*People ex rel. Vega v Smith*, 66 NY2d 130, 141, quoting *Wolff v McDonnell*, 418 US 539, 556). The prevention, detection and resolution of the myriad daily crises in this netherworld demand the acutest sensory awareness, undulled by the use of illicit drugs (see, *Matter of Figueroa v Brownstein*, 38 NY2d 523, 535). The public employer and society are unquestionably entitled to the guard's undeviating concentration and split-second good judgment and self-control.

The crucial nature of this state interest is not some hyperbolic or abstract proposition. The Commissioner made the case for random drug testing of the employees on empirical data, on intuitive professional judgment and experience, and only after other methods failed to stem the tide. Despite the Department's regimen of education and reasonable suspicion testing, in a recent 32-month period, drug-related disciplinary charges were brought against 149 tenured guards. In 1986 and 1987, 2.9 percent of probationary guards tested drug positive, despite being warned about the tests (see, Rec on App. at 136-137 [Affid. of Correction Dept. Chief of Operations Thomas Murray]). Downplaying the implications of the dreadful data cannot dull the gripping reality. With all the Com-

mission's existing tools in operation, many jail guards were caught in drug-related incidents. These data also stand in sharp contrast to the only 10 OCCB members facing drug-related disciplinary charges over a four-year period in *Matter of Caruso* (see, 72 NY2d, *supra,* at 442) and the lack of any evidence of any drug use problem among potential test subjects in *Matter of Patchogue-Medford Congress of Teachers v Bd. of Educ.* (70 NY2d 57, *supra*) and *Natl. Treasury Employees Union v VonRaab* (489 US ____, 109 S Ct *supra,* at 1394).

The Supreme Court's rationale upholding the constitutionality of suspicionless drug testing of customs agents in *VonRaab* (*id.*) offers another instructive perspective. It focused significantly on two components of the agents' duties pertinent here as well: their responsibility for interdicting drugs and the carrying of firearms. New York City jails are populated by substantial numbers of the State's criminal drug users; half the inmates are drug addicts and 90 percent are drug users or abusers. Guards represent a critical barrier between inmates and suppliers on the outside; drug-compromised guards breach that barrier and that makes them and this case very different from most others.

Petitioners-appellants, nevertheless, suggest that random drug testing is not needed for them in any event since they "generally do not carry firearms while on duty and the number who do is kept at an absolute minimum" (App's Brf. at 22). This suggestion seems disingenuous, since Department policy forbids guards to carry firearms because they operate in places too dangerous for guns. Guards are outnumbered by the inmates and are denied weapons because the Department knows that many prisoners, already illegally armed with makeshift devices, would thus have the potential to acquire real weapons taken from the guards in their midst (see, Rec on App. at 133 [Affid. of Chief of Operations of NYC Department

of Correction]). The primary "weapon" of the guard is alert, clear-headed, measured responsiveness to a daily, unrelentingly tense, caged co-existence.

These jailers are on call 24 hours a day and, "[b]ecause successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from [their supervisors] personal information that bears directly on their fitness" (*Natl. Treasury Employees Union v VonRaab*, 489 US ____, 109 S Ct, *supra*, at 1394, citing *Matter of Caruso v Ward*, 72 NY2d ____, *supra*, at 441). Indeed, OCCB officers "regularly" interact with the drug world inhabitants out in the hard streets, jail guards "constantly" interact with the most dangerous of society's concentrated mass in the confines of their walled symbiotic universe. We conclude that jail officials must be allowed to use proportionate and constitutional means to prevent, or at least to lessen, the volatile infiltration of drugs into the jails in and on the bodies of the guards themselves.

The Procedural Safeguards

We now assess the adequacy of the program's proposed protocols, and whether the tested employees are subjected to "unregulated discretion" (*Matter of Caruso v Ward*, 72 NY2d 432, *supra*, at 438; *Matter of Patchogue-Medford Congress of Teachers v Bd. of Educ.*, 70 NY2d 57, *supra*, at 70). A computer randomly selects 50 officers (out of a force of 7,200) every two weeks. A tenured officer may be discharged for refusing to comply with test procedures, but only after a hearing. The employee being tested may be accompanied by a union representative or attorney. State-of-the-art techniques—substantially the same as those approved by the Supreme Court in *VonRaab* (*Natl. Treasury Employees Union v VonRaab*, 489 US ____, 109 S Ct. 1384, *supra*)—are to be used in

collecting the specimen, assuring its integrity, preserving it for challenge and for testing and retestings. If the sample tests positive, it is retested by a more sophisticated method to ensure reliability. If the result is unchanged, the employee who supplied the sample may choose a different State-certified laboratory to test the sample yet again. As noted earlier, the specimen is produced in a private, closed stall, unlike the directly-observed procedures elsewhere countenanced. The protocols overall allow for very little discretion and certainly not that which could be called "unregulated discretion". Finally, they assiduously protect the residual privacy expectations of the guards.

Conclusion

By choosing to work in the paramilitary milieu of the City Correction Department, guards voluntarily sacrifice certain cherished freedoms. The search procedure we authorize today, after satisfaction of our rigorous standards, is an exceptional reasonable addition, albeit a significant one, to a long list of other searches, also significant in their places, times and contexts, to which these uniformed guards have already submitted themselves. Our holding portends no avalanche of such searches or any diminishment of our vigilance in the protection of constitutional safeguards.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

WACHTLER, Ch. J. (Dissenting):

The majority's decision, permitting random urine testing of the entire uniformed force of the New York City Department of Correction, represents an unwarranted extension of the narrow exception permitting such searches only under the most extraordinary circumstances.

The narrow exception on which the majority relies may well be applied, as it was in *Matter of Caruso v. Ward* (72 NY2d 432, 433), to an "elite voluntary corps within the New York City Police Department" which constituted "its main line of offense and defense in the war against drug trafficking." In that case we emphasized that the "daily exposure to drug users and traffickers [and] staggering sums of money" set this small, elite group apart from other police officers. Significantly we did not hold that police officers generally, who might occasionally be subject to the same temptations, could also be subject to random urine testing and indeed we held that they could not (*Matter of Caruso v Ward, supra,* p 439). Instead we took great pains to point out that we were only recognizing a "narrow exception" on "unique facts" involving "these particular officers" who were members of an "elite corps" who "specialized" in "hazardous drug-related investigations" and who volunteered for this special duty knowing well in advance "that they will be held to the strictest standards of probity and purity, over and above those already imposed on the police force at large" and thus "will have to operate in fish-bowl like circumstances undreamed of by Calpurnia herself" (*Matter of Caruso v Ward, supra,* at pp 434, 435, 439, 440, 441).

With this narrow exception in hand, the majority now permits periodic, random urine testing of every uniformed member of the Department of Corrections in the City of New York. It does so by abandoning many of the unique, limiting factors present in *Caruso* and adopting instead a "fact-specific" analysis which apparently will vary from case to case without fixed or discernible limits.

Following this precedent, it would be difficult to imagine how any officer, or anyone employed in the world of law enforcement or even anyone associated with the criminal justice system, would be free of the requirement of random, suspicionless urine testing once someone in au-

thority found it desirable. This turns the narrow exception into a general warrant permitting the government to intrude in the most offensive manner on the privacy and dignity of a large segment of our community.

There is no question that a urine test ordered by the government to detect drug abuse constitutes a search under both the state and federal constitutions (*Matter of Patchogue-Medford Congress of Teachers v Board of Educ.*, 70 NY2d 57; *Matter of Caruso v Ward, supra; Natl. Treasury Employees Union v Von Raab*, ___ US ___, 109 S Ct 1384; *Skinner v Ry. Labor Executives' Assn.*, ___ US ___, 109 S Ct 1402). It is also clear that under special circumstances the government may require persons serving the public to submit to such test on a random basis without the constitutional protections generally indispensable to any search (*Matter of Caruso v Ward, supra; Natl. Treasury Employees Union v Von Raab, supra; Skinner v Ry Labor Executives' Assn., supra*). This is not an ordinary exception, but actually a double exception to what the constitution generally requires: a warrant and probable cause or reasonable suspicion. It is also clear from our cases that this extraordinary exception is only available in the narrowest of circumstances.

In *Matter of Patchogue-Medford Congress of Teachers v Board of Educ.* (*supra*), we held that probationary teachers in the public school system could not be required constitutionally to submit to random urine testing for drug abuse. We noted that those who chose to work for the government, including teachers, have a diminished expectation of privacy because of the state's legitimate interest in determining their fitness to perform their jobs and that this permitted the state to require them to submit to urine testing whenever there was reason to believe that they were using drugs. The school district was not required to obtain a warrant or establish probable cause. But we rejected the district's argument that the teachers'

expectation of privacy was so diminished that they could be subjected to random urine tests at the will of the employer. We noted (at p 70): "random searches conducted by the state without reasonable suspicion are closely scrutinized, and are generally only permitted when the privacy interests implicated are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subjected to unregulated discretion." We found this narrow exception inapplicable in that case because a compelled urine test is not a minimal intrusion on the dignity and privacy of the individual and could not be justified by the state's general interest in determining the fitness of its teachers and maintaining a drug-free environment in the schools.

More recently in *Matter of Caruso v Ward* (*supra*), as noted above, we upheld a random urine test program as applied to an elite unit of police officers in the New York City Police Department. The opinion there shows that urine testing constitutes a great intrusion on an individual's privacy which cannot be permitted unless the individual's job is uniquely sensitive and thus the public accountability so great that the expectation of privacy is insubstantial.

Relying on *Patchogue*, we held that such an intrusion is not warranted with respect to public employees generally although their expectations of privacy are diminished to some extent by the state's legitimate right to inquire into their ability to perform the job. But we also hold that police officers generally could not be required to submit to such tests although their privacy expectations were "even further diminished by virtue of their membership in a paramilitary force, the integrity of which is a recognized and important State concern" (*Matter of Caruso v Ward, supra,* p 439). If we were only dealing with ordinary police officers, we noted, the random tests could not be sus-

tained because "the special status of police officers does not alone reduce their expectation of privacy to minimum level in respect to drug testing" (*Matter of Caruso v Ward, supra,* p 439).

What we found determinative in *Caruso* was that the officers involved were not ordinary police officers, but "special officers". They had volunteered from the ranks to participate as select members of an "elite group", with special job benefits and career opportunities, which specialized in investigating highly sensitive drug transactions, and which by definition and common understanding called for performance and integrity, and thus public accountability, well beyond what was expected of police officers generally. On those unique facts we were persuaded that the privacy expectations of these particular officers had become insubstantial and that a narrow exception was warranted permitting the Police Department to require these particular officers to submit to periodic urine testing. We noted that by voluntarily seeking this special assignment and accepting the extraordinary public scrutiny which it necessarily required they had "already subjected themselves to substantial privacy intrusions" well "above and beyond those already imposed on the police force at large."

Now we have before us a case in which the Commissioner of Correction in the City of New York wants compulsory random drug testing for every uniformed member of his department. The commissioner urges, and a majority of this court agrees, that these employees have no reasonable expectation of privacy with respect to these tests because of the following factors: they are members of a paramilitary organization, are authorized to carry firearms, are deemed to be "on duty" 24 hours a day, are charged with enforcing the laws including those relating to illegal drugs, that they are therefore subject to corrupting influences which may impair their integrity and ability

to perform in emergencies and that they voluntarily chose the position, consented to extensive background investigations and submitted to periodic drug testing during their probationary terms. In addition there is evidence that a small percentage of corrections officers have been involved in illegal drug usage or transactions in the recent past.

All of this is true, but it is also true of police officers generally. In fact the only apparent distinction between these officers and ordinary police officers is that corrections officers enforce the law in the controlled environment of a secure correctional facility, where they are not generally permitted to carry firearms, and are not likely to be exposed to large drug deals or staggering sums of money that other officers encounter on the streets. To be sure all those passing through the prison's gates, employees and visitors alike, may reasonably be subject to limited searches of clothing and personal possessions for contraband. But submitting to screening of that nature is not an open invitation to the more intimate search involved in urine testing.

Moreover, the fact that these officers are subject to such close supervision and constant scrutiny shows that the employer here is in a better position than any to detect illegal drug use by observation at the workplace. The employer can subject officers to a personal search at any time; their cars—and any packages they carry—can be searched as they enter and leave the facilities; their lockers are regularly searched; and they work in a confined atmosphere, subject to close supervision. There is, therefore, no basis for relieving this employer of the minimal reasonable suspicion requirement. If reasonable suspicion is inadequate under the circumstances of this work environment, then it will always be inadequate and this limitation on the narrow exception is a nullity.

What the majority has done in effect is to treat prison guards as prisoners. Its majority's reliance on *Bell v Wolfish* (441 US 520), to demonstrate a diminished expectation of privacy in the prison environment is telling because the case deals with the rights of prisoners. Those who enforce the law in a jail certainly should enjoy greater privacy rights than those who have been confined.

In short, this case deals with ordinary law enforcement officers performing normal patrol duties in the correctional institutions; it does not involve a small segment of the Correction Department or an elite corps of officers subject to extraordinary scrutiny beyond what is expected by law enforcement officers generally. Indeed, in many parts of the state, the Sheriff's Department performs both police roles interchangeably, enforcing the law in the streets and in the prisons. To apply the exception permitted in *Caruso* which was prompted by the unique factors present there, in a case where they do not exist, converts the narrow exception into a broad one without tolerable, predictable or even durable limits.

The government can always argue, as the commissioner does here, that random urine testing is the only effective means for detecting drug abuse. In *Caruso,* the necessity for such testing was urged because OCCB officers operated in the field, independently, not subject to the ready observation of their superiors; in direct contrast, it is now argued that correction officers must be so tested precisely because of their confinement in close quarters, where obviously they are subject to the ready observation of their superiors. And arguments can always be made that one group or another serving the public, even in the private sector, should be above suspicion of drug use and thus subject to random urine testing ordered by the government. The arguments are difficult to resist because urine testing is effective and eradication of illegal drug usage is such a desirable goal.

But they are equally difficult to reconcile with the constitution when the result is a progressive erosion of prior restrictions and a continuous expansion of the government's power to search large segments of our community without a warrant, without probable cause, and without reason to suspect them of illegal acts. Searching thousands of innocent people to discover a few offenders has long been considered the hallmark of unreasonableness. This basic constitutional principle was not meant to protect only criminals, or those suspected of crime; it was designed to protect us all, including those who serve in the law enforcement community. It is neither reasonable nor just to expect those who routinely enforce the law to submit to indignities which those who violate the law can constitutionally escape.

Even if the present drug crisis abates, these precedents will endure. Today's decision makes an important constitutional right the latest casualty in the war on drugs.

Order affirmed, with costs. Opinion by Judge Bellacosa in which Judges Simons, Alexander and Hancock concur. Chief Judge Wachtler dissents and votes to reverse in an opinion in which Judges Kaye and Titone concur.

Decided May 8, 1990

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

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2 No. 180 SSM 4

IN THE MATTER

OF

LARRY E. MCKENZIE, JR.,

Appellant,

v.

NORWOOD E. JACKSON, &C.,

Respondent.

Robert D. Goodstein, New Rochelle, for appellant.

Marilyn J. Slaaten, Westchester County Attorney (Carol L. Van Scoyoc of counsel) for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed with costs.

Petitioner was dismissed from his position as a probationary correction officer by respondent Commissioner of the Westchester County Department of Correction, after testing positive for cannibis in a random urinalysis test

conducted in the seventh month of his 12-month period of probation. The test was mandated by the Department's policy of requiring probationary correction officers periodically to produce urine samples to be analyzed for evidence of illegal drug use. Petitioner was aware of this policy when he accepted the position. We have today concluded in *Matter of Seelig v Koehler* (___ NY2d ___ [decided today]) that the random urinalysis testing of tenured correction officers of the New York City Department of Corrections, without reasonable suspicion and under circumstances and procedures nearly identical to those employed in this case, comports with the exception articulated in *Patchogue-Medford* and is therefore constitutionally permissible (see also, *Matter of Caruso v Ward*, 72 NY2d 432). No different result is warranted here.

On review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, in a memorandum, Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided May 8, 1990

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-48

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PHILLIP SEELIG, as President of the Correction Officers Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-against-

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

VICTOR A. KOVNER,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 566-4331 or 4327

LEONARD J. KOERNER,*
FRANCIS F. CAPUTO,
MICHAEL S. ADLER,
of Counsel.

* Counsel of Record

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QUESTION PRESENTED

Does the New York City Correction Commissioner's plan to administer drug tests on a periodic basis to correction officers comport with the Fourth Amendment, where (1) there is a compelling justification for such testing because of such factors as the nature of the duties of correction officers, the intolerable risks that drug abuse on their part poses, correction officers' regular exposure to drug addicts and drug users, and the proven insufficiency of lesser measures in abating a palpable drug use problem among correction officers; (2) where correction officers enjoy extremely limited expectations of privacy with regard to security-related employer intrusions; and (3) where the plan is based upon detailed regulations that prevent unbridled discretion and preserve privacy to the maximum extent feasible?

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CITATION

The decision of the New York State Court of Appeals is reported officially at 76 NY2d 87 and unofficially at 556 NYS2d 832 and 556 NE2d 125.

No. 90-48

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PHILLIP SEELIG, as President of the Correction Officers Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

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-against-

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

(1)

The job of a New York City correction officer is especially delicate and demanding. Working largely in confined environments with violence-prone anti-social inmates who vastly outnumber them, correction officers

are responsible for insuring that prisoners strictly conform to prison regimentation and requirements; for protecting the safety and security of inmates, prison personnel, visitors, and prison facilities; and, in general, for insuring that sentences of imprisonment properly serve their rehabilitative, deterrent, incapacitative, and punitive purposes (133, 148).[1] Their work mandates that they perform at optimal mental and physical levels at all times (133-34). Thus, for example, correction officers must have the mental acuity and soundness of judgment to tactfully coax recalcitrant inmates into obeying regulations, to quickly perceive and prudently defuse explosive situations, and to withstand without overreaction the torrent of insults and

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[1] Numerical references in parentheses are to pages of the record on appeal before the New York State Court of Appeals, unless otherwise noted or apparent.

provocation commonly hurled their way by inmates (133-34). Likewise, uncompromised physical status is imperative to enable a correction officer, for example, to properly utilize a firearm or other weapon when necessary without endangering innocent parties, to physically intervene in order to break up frequent brawls among inmates, and to exercise necessary vigilance when manning a tower guard post or when searching visitors (74-75). The position of correction officer also demands questionless integrity, given the endless opportunities for corruption with which inmates and their criminal cohorts tempt correction officers and given the incalculable harm that can result from corruption and blackmail (75-77).

Indicative of the perilousness of the environments in which they operate and at the same time compounding the formidability of their tasks is the fact that the Correction Department has judged it necessary to

decree that correction officers not carry their weapons while performing ordinary patrol and supervisory duties because of the likelihood that inmates would overpower the officers and seize the weapons (133). All correction officers, however, are trained in the use of firearms and routinely carry guns when performing perimeter guard duty, when transporting prisoners, when guarding hospitalized prisoners, when searching for escaped prisoners, and at other appropriate times. In addition, even when performing ordinary patrol duties, all have access to revolvers, shotguns, and other weapons for use in quelling major disturbances and when otherwise essential.

Because the usage of illegal drugs by correction officers impairs vital mental and physical abilities and because such usage compromises integrity and paves the way for corruption and blackmail, the Correction Department has long been intent upon

insuring that correction officers do not engage in such misconduct. Heightening the Department's concern is the fact that the overwhelming majority of inmates with whom correction officers deal on a daily basis are either drug addicts or drug users. As a result, correction officers are frequently offered drugs as bribes by inmates and their cohorts and must be ever alert to the interdiction of drugs.[2] An additional result is that drug-using correction officers have a ready and highly profitable market at hand for the peddling of drugs -- a market the exploitation of which leads ineluctably to the frustration of drug rehabilitation efforts among inmates, the facilitation of bizarre drug-induced behavior on the part of

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[2] It is noteworthy that, during 1988, a total of 43 prison visitors were arrested on drug-related charges. In 1989, the figure increased to 74. Moreover, on the average, 15 inmates per month are caught with illegal drugs.

inmates, and the promotion of rivalry, combativeness, and violence among inmates who crave these commodities. Yet another result is that the chances are excellent that some inmates will have ties to the same drug network through which a drug-using correction officer receives his supply, will accordingly learn of the officer's usage, and will put the information to good advantage.

Because of this concern over drug usage by correction officers, the Department has long taken measures to discourage drug use among its members and to weed out abusers. Among the measures employed have been intensive educational efforts. Indeed, all applicants for the position of correction officer, all probationary correction officers, and all tenured correction officers are repeatedly warned about the dangers associated with drug usage and about the Department's absolute prohibition of such usage (139-40).

In addition to educational efforts, the Department has employed urinalysis drug testing. In supplementation of the Department's long-standing reasonable-suspicion drug-testing program, the Department has adopted several across-the-board drug-testing programs. To begin with, all applicants are tested for drugs (147). Further, all correction officers are now subjected to four suspicionless drug tests during their 18-month probationary periods. To guard to the maximum extent possible against adulteration of samples or other methods of cheating (tactics to which drug-abusing correction officers have resorted to avoid detection), the Department assigns a monitor to observe the collection of the urine sample in all reasonable-suspicion testing, in applicant testing, and in all four testings of probationers.

The Department has concluded that random drug-testing is imperative with

regard to tenured correction officers. Underlying this conclusion are not mere abstract beliefs that reasonable-suspicion testing, educational efforts, and other conservative measures have proven insufficient to meet the Department's needs but alarming statistical evidence of a drug problem in the Department unabated by such measures. Thus, in the 32-month period between January 1, 1985 and August 31, 1987, drug-related disciplinary charges were brought against a total of 149 tenured correction officers (136). This represents a rate of over 1.1% per year of the tenured correction officer force. Similarly, in the calendar year 1988, a total of 88 tenured correction officers were terminated or resigned as a result of drug-related charges -- a figure that translates into over 1.2% of the tenured correction officer force at the time.

These percentages are all the more worrisome when one realizes that they represent not the total number of drug offenders on the tenured force but merely those against whom the Department has been able to amass sufficient evidence to bring charges in the absence of any across-the-board drug-testing program for tenured officers. The Department believes that there are many more drug offenders on the force who have avoided detection (71).

Other evidence supports the Department's fears. For example, between January 1, 1986 and August 31, 1987, a total of 2,411 probationary officers were tested at the Academy (137). All were given approximately one week's advance notification of their testing date, allowing even frequent drug users to avoid detection simply by abstaining from drug usage for that period. Nevertheless, an astounding 2.9% tested positive (137). Similarly, the past several

years have witnessed a vast increase in the quantity of drugs successfully smuggled to inmates -- an increase that, in the Department's view, can be explained only by the participation of correction officers (134).

(2)

Before effecting its plan for the random drug-testing of tenured correction officers, the Department, on November 17, 1987, issued a directive containing detailed regulations concerning the working of the program (53-64). The directive discusses, inter alia, the scope and need for the program, the selection and testing procedures, and the treatment of test results (53-64).

With regard to scope, the directive notes that it is applicable to all uniformed members of the Department including the Chief of Operations and the Commissioner (53). Similarly, it notes that the purpose is to deter and detect drug abuse for internal

Departmental reasons (54) -- and not to facilitate criminal prosecution (138). With regard to need, the directive states: "In spite of an aggressive drug prevention educational program and testing procedures, including an aggressive reasonable suspicion testing program, the Department has documented a serious drug abuse problem among a significant number of its members" (54).

As to the selection procedure, the directive notes that it is to be wholly neutral and based on social security numbers (55). Specifically, a computer will be programmed to randomly select for testing fifty members every two weeks (55). Following selection, a member will be so notified on the assigned testing date (56). A supervising officer will escort the member to the Health Management Division, where testing is conducted (56-57).

With regard to testing procedures, the directive is modelled after the procedures

adopted by the U.S. Department of Health and Human Resources for the Federal Government's drug-testing program -- procedures that were upheld by this Court in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989). The directive enumerates a series of steps designed both to protect personal privacy and assure testing integrity. Following a member's arrival at the Health Management Division, identification is carefully checked (57) and the member is asked to provide a listing of medications and foods recently ingested (60). A member is afforded the right to consult in person or by phone with an attorney or a union representative before deciding whether to submit to testing and is also afforded the right to have that attorney or representative witness the testing procedure (61).

Specimens are provided in a private closed stall without observation by anyone else (57). To thwart adulteration, however,

a Health Management Division monitor of the same sex is assigned to remain outside the stall, to receive the specimen from the tested individual, and to inspect the specimen for signs of irregularity or contamination (57-59). In addition, the toilet water in the stall is tinted blue to deter its use to dilute a specimen (58).

Significantly, this sample-taking procedure provides for more individual privacy than does the procedure to which correction officers have become accustomed in their pre-employment testing and their four probationary testings. As noted previously, those testing programs involve the provision of specimens under the direct visual observation of a monitor in order to guard to the maximum extent possible against cheating. The Department has adopted a more privacy-sensitive procedure here in an excess of caution because it views the establishment of a random-testing program

for tenured correction officers as imperative and wishes to minimize the possibility of constitutional invalidation.

Once the monitor has received the specimen and judged it legitimate, he tightly caps it, seals it with evidence tape, and labels it in the presence of the tested individual, who initials both the label and accompanying forms (59). The Health Management Division thereafter follows careful procedures to maintain an unbroken chain of custody at all times (59). Testing for drugs is thereafter performed at an accredited laboratory by means of the thin layer chromatography test and the enzyme multiplied immunoassay technique (60). In the event of a positive finding, a confirmation test by means of gas chromatography/mass spectrometry, a virtually infallible technique, is performed (60). The individual tested is thereafter advised of the results (62). If the results

are negative, notations are kept in the Legal Division but no record is maintained in the individual's personnel file (63). If the results are positive, the Legal Division is advised and disciplinary charges may ensue (63). Specimens containing drugs are maintained at the laboratory for six months, and the correction officer involved is afforded the right to have the specimen retested at an accredited laboratory of his choosing (61). Tenured officers found guilty after an administrative hearing face penalties that include dismissal (54).

(3)

On or about November 30, 1987, petitioners -- the labor union representing New York City correction officers and the union's president -- commenced the instant action to invalidate the Commissioner's directive (12-39). Relying upon both the Fourth Amendment and Article 1, Section 12, of the New York State Constitution, they

argued that drug-testing constitutes an unconstitutional search and seizure when it is not based upon individualized suspicion of drug abuse (17-25). They further argued -- without supplying any expert opinions or other supportive evidence -- that random testing is unnecessary, since the Department's legitimate interests in deterring and detecting drug abusers can be adequately satisfied through reasonable-suspicion testing (12-39).

In their answer, respondents alleged that the challenged program is in all respects constitutional (41-51). Respondents cited, inter alia, the limited expectations of privacy enjoyed by correction officers, the planned program's reliance upon procedures that minimize intrusion upon privacy, the compelling government interests in deterring and detecting drug abuse, the evidence of an incipient drug problem within the Department that lesser measures had been

unsuccessful in abating, and expert scientific opinion that reasonable-suspicion testing and other measures short of periodic testing are incapable of meeting the Department's needs (41-50). In support of their answer, respondents submitted an affidavit by Thomas Murray, the Correction Department's Chief of Operations, elaborating on the compelling justification and a second affidavit by Dr. Robert L. DuPont, a nationally-recognized medical expert on drug-testing, discussing the pernicious effects of drug abuse, the particular dangers posed by drug abuse on the part of correction officers, the legitimacy of the Department's apprehension concerning a worrisome drug problem in its midst, and why measures short of random testing are insufficient to meet the Department's needs (68-93).

By judgment entered on October 20, 1988, the New York State Supreme Court granted the petition and enjoined implementation of the directive. 140 Misc2d 783 (Sup. Ct., N.Y. Co., 1988). By order entered on October 12, 1989, the Appellate Division-First Department, by a vote of 3-to-2, reversed and upheld the directive. 151 AD2d 53 (1st Dept., 1989). By order entered on May 8, 1990, the New York State Court of Appeals, by a vote of 4-to-3, affirmed. 76 NY2d 87 (1990).

In upholding the program, the Court of Appeals carefully followed and repeatedly cited this Court's opinions in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989), and Skinner v. Railway Labor Executives' Ass'n, 109 SCt 1402 (1989). The Court of Appeals based its affirmance on its conclusions that correction officers enjoy vastly diminished expectations

of privacy with respect to security-related employer intrusions upon privacy, that the Department had demonstrated a compelling interest in the deterrence and detection of drug use among correction officers, that this compelling Departmental interest outweighed the intrusion engendered by drug-testing upon those already diminished expectations, and that promulgated regulations prevented unbridled administrative discretion and preserved privacy to the maximum extent feasible. 76 NY2d at 89-90.

With regard to privacy expectations, the Court of Appeals noted that not all governmental employees enjoy equal privacy expectations and that such factors as voluntary pursuit of a position one knows to be pervasively regulated for reasons of safety and acceptance of severe intrusions upon privacy serve to markedly diminish expectations. Id. at 91. The Court noted that it is widely recognized that "correction

officers, because of the confined environment in which they work, the strict security measures governing their conduct, and the other distinctive features of their employment, have diminished expectations of privacy with regard to security-related employer intrusions." Id. at 91-92. The Court cited as well the many intrusions upon privacy long accepted by correction officers, including searches of cars and packages brought into jail facilities, regular searches of lockers, and searches of a correction officer's person at any time -- by force if necessary. Id. at 92-93. In addition, the Court cited the fact that correction officers undergo five suspicionless drug tests before reaching tenure. Id. at 92.

As to the governmental interest served, the Court of Appeals cited a number of factors rendering this interest overriding. The Court noted that the prison environments in which correction officers

work are fraught with serious security risks, requiring that correction officers operate without impairment of physical or mental abilities and with unblemished integrity. Id. at 93. Compounding the risks posed by drug abuse on the part of correction officers, the Court stated, is the composition of the New York City prison population -- a population 50% of whom are drug addicts and 90% of whom are at least drug users. Id. at 94. As a result, correction officers "represent a critical barrier between inmates and suppliers on the outside." Id. The Court additionally observed the existence of empirical evidence that measures short of random testing had been unsuccessful in deterring drug abuse. Id. The Court cited proof in the record that drug-related disciplinary charges had been brought against 149 tenured correction officers in a 32-month period and that fully 2.9% of probationary officers had tested

positive for drugs despite advance notification of testing. Id. at 94.

Finally, the Court of Appeals found the procedural safeguards to be wholly adequate, noting that they closely resemble those upheld by this Court in National Treasury Employees Union v. Von Raab, supra. Id. at 95-96. The Court of Appeals observed that selection is performed at random by a computer; state-of-the-art testing techniques are employed; samples are obtained without observation; employees who test positive may insist upon re-testing at another laboratory; and a hearing takes place before any discipline is imposed. Id. at 95-96.

The dissenting Court of Appeals judges viewed the challenged program as unconstitutional. Id. at 96-101. They did not take issue with the proposition that, in light of decisions of this Court and other Federal courts, the program passes constitutional muster under the Fourth

Amendment. Id. However, apparently invoking Article 1, Section 12, of the New York State Constitution, the dissenters judged the program unconstitutional because, in their view, it extended beyond the limitations on random testing previously set forth by the Court of Appeals in a case entitled Caruso v. Ward, 72 NY2d 432 (1988). The dissenters argued that random testing was upheld in Caruso because only a small elite unit of police officers was involved, that unit specialized in drug crimes and was consequently frequently exposed to drugs and to large sums of money, and that unit could not be subjected to careful scrutiny in the course of their duties. Id. at 96-101. The dissenters found the instant program less justifiable, reasoning that correction officers do not always carry guns while on duty, are less frequently exposed to drugs and bribes, and can be more carefully scrutinized. Id.

Following decision of the case by the Court of Appeals, petitioners requested that that Court grant them a stay pending a planned petition to this Court for certiorari. That application was denied on May 25, 1990. Petitioners thereafter requested a stay from this Court, which likewise denied the application on June 18, 1990. 110 SCt 3209 (1990).

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED, SINCE THE DECISION OF THE NEW YORK STATE COURT OF APPEALS IS IN COMPLETE HARMONY WITH THE TEACHINGS OF THIS COURT IN THE DRUG-TESTING FIELD AND WITH THE MUTUALLY CONSISTENT DECISIONS OF THE CIRCUIT COURTS OF APPEALS IN THAT FIELD. IN ADDITION, TREATMENT OF THE INSTANT CASE BY THIS COURT WOULD DO LITTLE TO ADVANCE THE STATE OF FEDERAL CONSTTTUTIONAL LAW.

There is no persuasive reason for the granting of certiorari in this case. In rendering the decision that it did, the New

York State Court of Appeals hewed carefully to the teachings of this Court in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989), and Skinner v. Railway Labor Executives' Ass'n, 109 SCt 1402 (1989). The decision of the Court of Appeals is likewise in accord with the holdings in this area of law of numerous Federal Circuit Courts of Appeals, which themselves are entirely consistent with one another. In short, it is now well established across the nation that the Federal Constitution permits random drug-testing of governmental employees where the testing is limited to a group of employees who hold positions that carry a severely diminished expectation of privacy with regard to such measures and as to which government has an exceptional interest in deterring and detecting drug abuse and where testing is conducted under regulations that reasonably limit discretion and protect privacy. It is

for this reason, no doubt, that this Court has several times denied certiorari in other cases presenting like issues. While the state of Federal constitutional law might well be advanced by the granting of certiorari in a random drug-testing case which involves a category of employees whose satisfaction of the above-stated criteria is questionable and which hence presents this Court with an opportunity to define the limits of random testing, little good would be served by the granting of certiorari in a case such as this, in which, regardless of where one reasonably draws the line, the challenged program unquestionably falls on the side of constitutionality.

The reasoning of the State Court of Appeal herein squarely comports with that employed by this Court in upholding drug-testing programs in National Treasury Employees Union v. Von Raab, supra, and

Skinner v. Railway Labor Executives' Ass'n, supra.

At issue in Von Raab was the constitutionality of the United States Customs Service's program of administering drug tests, without any reasonable suspicion predicate, to employees seeking promotion or transfer to positions that involve either interdiction of drugs, carrying of firearms, or access to classified information. 109 SCt at 1387-88. The program, aimed at both deterrence and detection, was not based upon any palpable drug problem within the agency, and, indeed, administered drug tests yielded positive results in only about 0.1 of 1% of cases. Id. at 1400 (Scalia, J., dissenting).

In analyzing the case, this Court noted that where a Fourth Amendment search serves special needs beyond the normal need for law enforcement, as is the case with regard to employee drug-testing,

individualized suspicion may not be a constitutionally necessary predicate where governmental interests outweigh intrusiveness upon reasonable expectations of privacy. Id. at 1390. The Court further noted that an individualized suspicion predicate may be more readily deemed constitutionally unnecessary with regard to searches aimed at both preventing and discovering harmful conditions that frequently do not generate articulable grounds for search -- a category into which the Court placed drug abuse. Id. at 1392, 1395. The Court found that, as to all three classes of employees covered by the program, the governmental interests at stake were compelling. Id. at 1393, 1396. With regard to drug interdiction personnel, the Court cited their exposure to the criminal element, to bribes, to threats, and to drugs. Id. at 1393. With regard to firearms-carrying personnel, the Court cited

the grave dangers posed by the possible misuse of deadly force and the Fourth Amendment values furthered by checking such misuse. Id. With regard to those with access to sensitive information, the Court cited the evils resulting from possible compromise of such information. Id. at 1396. The Court additionally found that the employee privacy interests implicated by the program were, under the circumstances, insubstantial. Id. at 1393-94, 1397. Relying upon the decision of the New York State Court of Appeals in Caruso v. Ward, this Court cited the employees' voluntary pursuit of positions that they know to require extraordinary assurances of trustworthiness and probity. Id. at 1394. In addition, the Court cited the unobserved nature of the testing program and other characteristics that both assure reliability and minimize embarrassment. Id. at 1394 n.2. The Court expressly rejected the

argument that the absence of proof of a substantial drug problem within the agency should disallow dispensation with individual suspicion, citing the difficulty of detecting drug use through mere observation and the further reason that "[w]here, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." Id. at 1395, 1395 n.3. In light of all of these factors, the Court fully upheld the program, with the exception of a remand for consideration of whether the program's definition of the sensitive information access category, which apparently covered such employees as accountants and baggage clerks, was overbroad. Id. at 1397.

In the second case, Skinner, this Court treated the constitutionality of post-accident drug-testing of railroad workers in the

absence of any individualized suspicion of drug abuse. As in Von Raab, the Court stated that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 109 SCt at 1417. Again, as in Von Raab, the Court found that the testing intruded insubstantially upon the workers' expectations of privacy, because of the limited nature of those expectations as a result of their voluntary selection of positions that they know to be pervasively regulated for reasons of safety and because of the lack of observation and other features of the testing program that minimize intrusiveness. Id. at 1418-19. The Court also found that the governmental interests at stake were substantial. Id. at 1419. The

Court cited the grievous harm that an impaired employee can cause and the difficulty of detecting drug abuse through observation, noting that such employees "can cause great human loss before any signs of impairment become noticeable to supervisors or others." Id. The Court further noted that not only was the interest in detecting drug abuse and identifying the causes of accidents compelling, but the interest in deterring drug abuse was likewise compelling and effectively furthered by the program. Id. at 1419-20. The Court cited the fact that workers could not predict in advance when an accident would occur and hence when they would be required to undergo drug-testing as a major factor validly promoting the deterrence objective. Id. The Court reasoned:

> The railroad industry's experience ... persuasively shows, and common sense confirms, that the customary dismissal sanction that threatens employees who use drugs ... while on duty cannot serve as

> an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs ... while subject to being called for duty.

Id. In light of the balance of interests at stake, the Court upheld the program. Id. at 1422.

These two decisions are highly supportive of the constitutionality of the program challenged in the case at bar. To begin with, they establish that individualized suspicion of drug abuse is not constitutionally necessary to permit the drug-testing of those employees working for or regulated by government (1) whose privacy expectations are vastly diminished because of their voluntary choice of highly sensitive positions involving great potential for harm and their

acceptance of pervasive regulation and (2) as to whom government has a compelling interest in conducting drug-testing without reasonable suspicion. Secondly, they establish that among the classes of employees who fall into this category are those who are responsible for interdiction of drugs, who are capable of inflicting grievous harm because they possess firearms, who have access to classified information, or who are responsible for the operation of trains. Thirdly, Von Raab establishes that proof of a pervasive drug problem within the particular workforce is not an essential predicate for such categorization where the potential harm against which government seeks to safeguard is substantial. Fourthly, the decisions establish that procedures like the ones adopted here are eminently constitutional.

The decision of the State Court of Appeals in this case is wholly consistent with Von Raab and Skinner. As in those cases,

the Court of Appeals engaged in a careful assessment of expectations of privacy and governmental interests and balanced the two. Furthermore, there can be no question that the Court of Appeals correctly gauged this Court's view of where the balance in the case at bar tips. Like the four classes of employees involved in Von Raab and Skinner, correction officers have voluntarily chosen occupations that they know to be pervasively regulated and to demand the utmost assurances of integrity and fitness. Like those classes, correction officers accept a host of intrusions upon privacy. Indeed, if anything, correction officers surrender far more of their expectations of privacy than members of those classes by virtue, inter alia, of their working in a locked-in environment and their inurement to five observed drug tests before reaching tenure. Furthermore, the governmental interests at stake in the deterrence and detection of drug

abuse among correction officers are surely at least as strong as those at stake with regard to the four classes. Indeed, in a very real sense, correction officers may be viewed as an amalgam of all four classes. Thus, they do not only have access to narcotics and perform drug interdiction functions. They do not only use firearms. They do not only have access to sensitive information about persons and crimes that, if divulged, could wreak havoc. They do not only carry the potential of causing or permitting deaths or injuries to large numbers of people through momentary oversight or indiscretion. Rather, they have all of these characteristics. What is more, in contrast at least with Von Raab, there is here supporting evidence of a perturbing drug problem.

Although neither Von Raab nor Skinner dealt expressly with periodic testing, there are strong indicia in the opinions that such testing is equally constitutional for the

classes involved as the programs precisely considered. Telling evidence is the reliance placed in Skinner upon the deterrence resulting from the fact that "employees in safety sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty." 109 SCt at 1420 (emphasis added). In so reasoning, this Court in effect conceptualized the program before it as one closely akin to random periodic testing -- the essential difference being only that the unpredictable triggering event is an accident in one case and selection of one's number by a computer in the other. Yet another indication is the Court's citation with approval of Caruso v. Ward -- a case specifically upholding random drug-testing. Id. at 1394.

Not only does the decision of the State Court of Appeals jibe with the approach taken by this Court, but it also comports with the

decisions in this area of law of the Federal Circuit Courts of Appeals -- including the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits. Indeed, in a host of cases (many of which involved far less compelling circumstances than the instant case with regard to such matters as governmental interests served, diminution of privacy expectations, job-related drug exposure, and evidence of a drug problem), Circuit Courts have upheld random testing programs for governmental employees in high-risk or high-hazard positions. Several of these cases have specifically upheld the random testing of correction officers. See, e.g., National Federation of Federal Employees v. Cheney, 884 F2d 603, 606n.4, 611-13 (D.C. Cir., 1989), cert. denied, 110 SCt 864 (1990) (various civilian employees of Department of the Army, including correction officers); Taylor v. O'Grady, 888 F2d 1189 (7th Cir., 1989) (correction officers having access to

firearms, opportunity to smuggle drugs into prisons, or contact with prisoners); McDonell v. Hunter, 809 F2d 1302 (8th Cir., 1987) (correction officers having contact with prisons; no evidence of drug problem). Among other categories of employees as to whom random testing has been upheld are those in various law enforcement occupations, including police officers,[3] guards,[4] and

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[3] Guiney v. Roache, 873 F2d 1557 (1st Cir.), cert. denied, 110 SCt 404 (1989) (police officers carrying firearms or engaging in drug interdiction; no evidence of drug problem); Policemen's Benevolent Ass'n v. Township of Washington, 850 F2d 133 (3d Cir., 1988), cert. denied, 109 SCt 1637 (1989) (police officers; no evidence of drug problem); Transport Workers Union v. SEPTA, 884 F2d 709 (3d Cir., 1989) (transit police officers); Weicks v. New Orleans Police Dept., 868 F2d 1269 (5th Cir., 1989) (certain police units; no evidence of drug problem).

[4] National Federation of Federal Employees v. Cheney, 884 F2d 603 (D.C. Cir., 1989), cert. denied, 110 SCt 864 (1990) (civilian Army guards).

criminal investigators.[5] Randon testing has likewise been upheld as to various employees in transportation-related occupations, including air traffic controllers,[6] pilots,[7] transit system operators,[8] and specialized motor vehicle operators.[9] Random testing has also been approved for miscellaneous employees in high-risk fields, even in the absence of drug exposure -- occupations

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[5] AFGE v. Skinner, 885 F2d 884 (D.C. Cir., 1989), cert. denied, 110 SCt 1960 (1990) (criminal investigators in transportation industry).

[6] National Federation of Federal Employees v. Cheney, supra; Bluestein v. Department of Transp., 908 F2d 451 (9th Cir., 1990) (private commercial aviation employees regulated by government).

[7] National Federation of Federal Employees v. Cheney, supra; Bluestein v. Department of Transp., supra.

[8] Transport Workers Union v. SEPTA, supra.

[9] AFGE v. Skinner, supra.

including nuclear power workers,[10] mechanics[11], and hazardous material biochemists and pipefitters.[12]

In short, there can be no claim here that certiorari is necessary because of a conflict between the instant decision and either all or even some of the decisions of the Circuit Courts as to similar issues. To the contrary, the various decisions appear to be in total agreement as to the proper outcome here.

This absence of conflict no doubt heavily accounts for the fact that, in the aftermath of Von Raab and Skinner, this Court has consistently denied certiorari on at least five

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10 Rushton v. Nebraska Pub. Power Dist., 844 F2d 562 (8th Cir., 1988).

11 AFGE v. Skinner, supra; National Federation of Federal Employees v. Cheney, supra.

12 Thomson v. Marsh, 884 F2d 113 (4th Cir., 1989).

none of these cases were the arguments supporting random testing as compelling as in the instant case with regard to such pertinent factors as the employees' acceptance of intrusions upon privacy, the employees' acceptance of prior suspicionless drug-testing programs, evidence of substantial drug usage by the employees, and evidence of the proven insufficiency of lesser remedial measures. If, notwithstanding these considerations, these cases were judged not to warrant legal exposition by this Court, there is no greater reason for the granting of certiorari herein. Indeed, we submit that explication by this Court concerning Federal constitutional law governing random drug-testing should best await a fact pattern in which the competing contentions are quite closely balanced, thereby giving the Court an opportunity to delineate the line beyond which random drug testers may not tread. This is not such a case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 29, 1990.

Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
FRANCIS F. CAPUTO,
MICHAEL S. ADLER,
of Counsel.

*Counsel of Record